BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Commission, on its own motion, to investigate jurisdictional issues pertaining to construction and operation of a natural gas pipeline within the state of Nebraska by Nebraska Resources Company, LLC, or any other entity.	)))))	Application No. NG-0051/ PI-130

POST-HEARING COMMENTS OF NEBRASKA RESOURCES COMPANY ON JURISDICTIONAL ISSUES

Nebraska Resources Company LLC ("NRC") hereby submits its Post Hearing Comments pursuant to the Pre-hearing Conference Order of the Nebraska Public Service Commission in the above captioned docket.

A. PROCEDURAL BACKGROUND

On July 16, 2007, NRC filed a letter request with the Nebraska Public Service Commission (the "Commission") to conduct an Investigation pursuant to Neb. Admin. Reg. Title 291, Chapter 1, Section 012.01 respecting three threshold "jurisdictional" questions on which NRC sought guidance preliminary to a determination of whether to file an Application under the State Natural Gas Regulation Act ("SNGRA"), NEB. REV. STAT. § 66-1801, *et seq*. (2006), for a Certificate of Public Convenience ("Certificate") as a "jurisdictional utility" to operate a new natural gas pipeline wholly within the state of Nebraska (the "NRC Pipeline") to deliver natural gas to local distribution companies ("LDCs") and other customers in central Nebraska.

On July 24, 2007, in response to NRC's request, the Commission opened the captioned docket to investigate issues related to NRC's proposed Application. The three issues which NRC requested the Commission to Investigate were:

1. Does the definition of "high-volume ratepayer" in section 2(7) of the Nebraska SNGRA, NEB. REV. STAT. § 66-1802(7) (2006), include LDCs with volumetric demand in excess of 500 therms per day?[1]

[1] The SNGRA defines a "high-volume ratepayer" as "a ratepayer whose natural gas requirements equal or

2. Does Nebraska's "double piping" prohibition under SNGRA section 52, NEB. REV. STAT. § 66-1852 (2006), apply to a pipeline providing a new interconnect to an LCD?

3. Does the Commission have jurisdiction over an Application under SNGRA section 53(1), NEB. REV. STAT. § 66-1853(1) (2006), for a Certificate of Public Convenience to operate as a "jurisdictional utility" a pipeline located wholly within the state of Nebraska to deliver natural gas to LDCs and other customers?

In addition, the Commission added a fourth issue to be investigated in this docket:

4. What other regulatory authorities, including state, federal and local governing bodies of any kind, would have jurisdiction over the NRC Pipeline, and what is the scope of their review?

On September 17, 2007, the Commission held a Pre-hearing Conference during which the Commission decided the hearing would be conducted in a legislative format. The Commission held the hearing on September 25, 2007. The NRC was represented by Loel P. Brooks, William F. Demarest, Jr., the President of NRC Dan Fry, and Scott Dicke of Olsen Associates.

B. SUMMARY

As set forth in our presentation to the Commission, the NRC believes that:

(1) the definition of "high-volume ratepayer" does not include LDCs;

(2) Nebraska's "double piping" prohibition does not apply to a pipeline providing a new interconnect to an LDC; and

(3) the Commission has jurisdiction over an Application for a Certificate of Public Convenience to operate as a "jurisdictional utility," a pipeline, located wholly within the state of Nebraska, to deliver natural gas to LDCs and other customers.

Furthermore, as an assurance to the Commission that the NRC is not pursuing Commission certification in any effort to avoid more stringent regulation at the federal level the NRC provides the following: (i) the Nebraska Resources Pipeline will be subject to all

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exceed five hundred therms per day as determined by average daily consumption." SNGRA § 2(7), NEB. REV. STAT. § 66-1802(7) (2006).

applicable state and federal environmental, safety, and operational regulations, and will address all land owner and stake holder rights; (ii) the Commission can retain, at the applicant's expense, independent outside consulting experts, experienced in the review of similar projects, without permanently adding cost or administrative burden to the PSC; (iii) the Commission can mandate that the NRC meet all conditions that would otherwise be required in a FERC 7(c) application; and (iv) the Commission can mandate that NRC provide evidence of compliance with all applicable agency regulations as a condition of granting the utility certification.

NRC's Post-Hearing Comments also respond to Comments and testimony of Intervenors and other participants in the Commission's hearing.

C. NEED FOR TIMELY AND DEFINITIVE DETERMINATION BY THE NEBRASKA PUBLIC SERVICE COMMISSION

Before addressing the specific jurisdictional issues which the Commission has certified for investigation, NRC believes it appropriate to reiterate the reasons why NRC has requested both timely and definitive determinations of the jurisdictional issues by the Commission.

Recent growth in demand for natural gas throughout the areas of central Nebraska which the NRC Pipeline proposes to serve has been driven by the explosive growth of ethanol demand and the siting of numerous new ethanol production facilities in that region. This growth is part of a shift in national energy policy toward greater utilization of renewable fuels generally and ethanol in particular.

Despite state and federal policies promoting greater utilization of ethanol, the lack of adequate natural gas transportation infrastructure in the part of Nebraska proposed to be served by the NRC Pipeline has become a limiting factor on economic growth in general and growth of the ethanol industry in particular. Existing pipeline capacity to the region is fully subscribed. Expansion of existing interstate pipeline capacity is hampered by the fact that most of the newly developed and planned ethanol plants are project financed, with little in the way of unsecured

assets to provide financial assurances to incumbent pipelines should the project-financed ethanol plant cease operations or otherwise fail to pay the demand charges associated with the expansion of the pipeline's capacity. In short, many of the prospective customers for new gas transportation capacity in this region of Nebraska cannot support a substantial addition of capacity to the region alone. The problem is a regional one demanding a regional solution. NRC has developed a strategy to overcome this constraint by developing commercial relationships with creditworthy shippers to anchor the NRC Pipeline project and by a willingness to accept greater risk than its competitors.

In addition to the signed Precedent Agreements NRC has already obtained from prospective Shippers on the NRC Pipeline, NRC is currently negotiating Precedent Agreements with additional potential Shippers with a view toward obtaining the aggregate commitments necessary to enable the project to go forward as described. Although NRC has not yet obtained the minimum volume commitment NRC believes is essential to an economically viable pipeline, NRC is optimistic that such commitments will be obtained in the near future. Indeed, NRC believes that timely affirmative action by the Commission will act as the catalyst to bring about additional Shipper commitments based upon enhanced perception of the viability of the NRC Pipeline project as proposed.

Recently, the lack of adequate firm natural gas transportation capacity to the City of Norfolk, Nebraska, became painfully apparent when a major soy bean processing facility that had planned to locate in Norfolk was forced to relocate to South Sioux City, Iowa, due to the inability of the plant to obtain firm natural gas service. The City of Norfolk suffered a loss of an estimated 150 new jobs as a result. This example draws into sharp relief the need for a pipeline, such as that proposed by NRC, to serve central northeast Nebraska.

In order for the NRC Pipeline project to go forward under regulation by the Commission,

the three preliminary jurisdictional questions raised by NRC in its Request for Investigation that lead to the institution of this docket must be resolved. If any one of the three threshold jurisdictional issues were decided adversely, the theoretical option available to NRC would be to seek a Certificate of Public Convenience and Necessity from the FERC under Section 7(c) of the NGA, 15 U.S.C. § 717f(c). Regrettably, if the Commission's determination of any one of the threshold jurisdictional issues is negative, NRC believes that based on timing considerations, the federal certificate option is no longer viable.

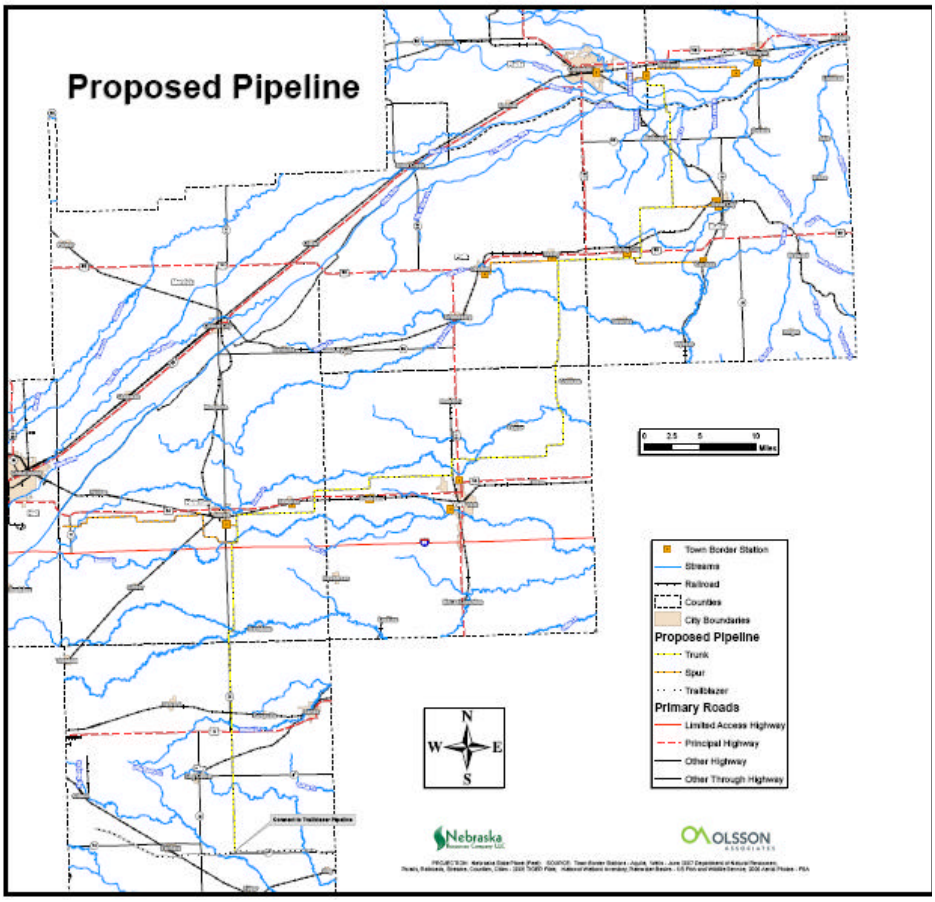
NRC's proposed March 2009 in-service date is driven by the needs of NRC's prospective customers, including Aquila, Inc. (D/B/A Aquila Networks). These customers need assurances that the NRC Pipeline will be in service at the time these customers existing gas transportation arrangements with other transportation service providers expire or when the ethanol plants become operational.

Finally, it should be self-evident that for NRC to proceed under Commission jurisdiction, the threshold determinations on the issues requested by NRC need to be more than merely a preliminary or tentative assessment by the Commission. NRC has already invested more than $700,000 in preliminary engineering, environmental review, legal and regulatory costs merely to bring the project to this tentative stage. NRC anticipates that it will invest an additional $5.6-$7.8 million (depending on whether the Pipeline is extended to Norfolk, Nebraska) to obtain all the approvals necessary before a single construction dollar is ever spent. In addition, NRC plans to commit $65-70 million to construct and test the NRC Pipeline before it is placed into service. NRC cannot commit to such substantial investments without assurance that the decisions of the Commission on the threshold issues is determinative and final, rather than preliminary or advisory and subject to further modification or change. For all these reasons, NRC urges the Commission to make a timely final determination of the threshold issues.

D. THE NRC PIPELINE PROJECT – OVERVIEW

NRC proposes to construct a new pipeline to serve growing demand for natural gas service in central Nebraska, including burgeoning demand from new and expanding ethanol plants. The NRC Pipeline project is directly responsive to the state of Nebraska's policies promoting development of improved infrastructure to support the growing ethanol industry in Nebraska. The NRC Pipeline would also provide the local distribution company serving the cities of Aurora, Bradshaw, Hampton, York, Columbus, David City, Osceola, Rising City, Schuyler, Shelby and Garrison, Nebraska, access to competitively priced natural gas supplies and improved reliability of service associated with an additional source of gas supplies.

The following map illustrates the tentative route of the NRC Pipeline.



As currently configured, the NRC Pipeline would originate at an interconnect with the mainline

facilities of Trailblazer Pipeline Company ("Trailblazer") in Edgar County, Nebraska. A second Receipt Point at an interconnect with the interstate pipeline facilities of Kinder Morgan Interstate Gas Transmission Co., LLC ("KMIGT") west of Aurora, Nebraska, is also planned. A Receipt Point in Schuyler, Nebraska, at an interconnect with the interstate pipeline facilities of Northern Natural Gas Company ("Northern") is not planned at this time but is a possibility as a part of the initial construction or at some point in the future. Also under active consideration is an extension of the NRC Pipeline ("Phase II") North from Columbus, Nebraska, to serve the City of Norfolk, Nebraska, if satisfactory commitments can be obtained to support the extension of the NRC Pipeline.

The Receipt Point with KMIGT, and the potential Receipt Point with Northern, will enhance the reliability of the NRC Pipeline's service by providing additional points from which gas could be sourced in the event of a constraint related to Trailblazer or its upstream supply. It should be noted that the design parameters of the NRC Pipeline call for flow control devices to be located at or downstream from each Receipt Point to prevent the flow of gas from the NRC Pipeline into KMIGT, Northern or Trailblazer. These devices will be installed to prevent the NRC Pipeline from being used to transport gas between interstate pipelines. Such transportation would be inconsistent with the concept of the NRC Pipeline as an intrastate delivery system located wholly within the State of Nebraska serving local demand for natural gas transportation capacity within Nebraska.

E. FEDERAL AND STATE JURISDICTIONAL ISSUES

The interplay between federal and state regulation over the proposed NRC Pipeline is complex and lies at the heart of this proceeding. It is that complex interplay that gives rise to both the regulatory alternatives for federal or state regulation of the NRC Pipeline and the need for resolution of the three threshold questions raised by NRC in its letter requesting this

Investigation. For that reason, before addressing the specific questions on which the Commission has requested comment, NRC believes it helpful to summarize the regulatory principles involved, including the scope of federal preemption of state regulation of "interstate" pipelines under the Natural Gas Act ("NGA"), 15 U.S.C. § 717, *et seq*.

1. Natural Gas Act Jurisdiction And The "Hinshaw" Exemption

Because 100% of the gas supplies transported by the NRC Pipeline will be received from an interstate pipeline, the transportation service provided by the NRC Pipeline will be transportation "in interstate commerce" notwithstanding that all of the gas is transported solely within the state of Nebraska. *Federal Power Commission v. East Ohio Gas Co.*, 338 U.S. 464 (1950). The potential reach of exclusive federal regulation of interstate commerce is very broad, impinging on activities commonly viewed as "intrastate" in character. In *East Ohio Gas Co.*, the Supreme Court was confronted with a high-pressure pipeline located wholly in a single State that received natural gas produced in another State and transported through an interstate pipeline to the point of delivery in the state where, following transportation through East Ohio's high pressure pipeline, the gas was distributed and consumed. In a series of previous cases, the Supreme Court had held that even though gas was transported wholly within a single state, the gas was "in interstate commerce." *East Ohio Gas Co.*, 338 U.S. at 467, citing *Colorado-Wyoming Gas Co. v. Federal Power Commission*, 324 U.S. 626 (1945); *Illinois Natural Gas Co. v. Central Illinois Public Service Co.*, 314 U.S. 498, 503-04 (1942). Indeed, the Supreme Court noted, "Respondents do not and cannot claim their gas is not in interstate commerce." *East Ohio Gas Co.*, 338 U.S. at 467. Rather, the issue in *East Ohio Gas Co.* was whether the gas was "transported" and therefore subject to regulation by the Federal Power Commission ("FPC") under the NGA. The Supreme Court concluded that East Ohio's movement of gas through a high pressure pipeline, albeit solely within the state in which the gas was consumed, was

"transportation of natural gas in interstate commerce" subject to regulation by the FPC under the NGA. *East Ohio Gas Co.*, 338 U.S. at 473 ("East Ohio comes directly within the express provision granting power to the [FPC] to regulate 'transportation of natural gas in interstate commerce,'. . . .").

Under the principles established in *East Ohio Gas Co.*, the NRC Pipeline would be an "interstate pipeline" subject exclusively to federal regulation. Accordingly, the NRC Pipeline *could* be constructed under certificate authority issued by the Federal Energy Regulatory Commission ("FERC")[2] under the NGA.

In response to *East Ohio Gas Co.*, Congress amended the NGA by creating the so-called "Hinshaw exemption," 15 U.S.C. §717(c), for pipelines that move gas in interstate commerce but which receive all of their gas supplies at or inside the state border and whose supplies are consumed totally within the state. Under the Hinshaw exemption, a pipeline that would otherwise be subject to federal regulation is exempt from regulation under the NGA if (but only to the extent that) the pipeline's **rates** are "subject to" state regulation. 15 U.S.C. § 717(c). Accordingly, if the rates charged by the NRC Pipeline are subject to regulation by the Nebraska Public Service Commission, the NRC Pipeline would be exempt from federal regulation with respect to the services that are subject to rate regulation by the Commission.

NRC believes that due to the essentially local nature of the service NRC proposes to provide to customers in Nebraska, the NRC Pipeline **should** be regulated primarily by the Commission rather than by the FERC. To that end, NRC proposes to file an Application for a Certificate pursuant to section 53(1) of the SNGRA, NEB. REV. STAT. § 66-1853(1) (2006), to operate the NRC Pipeline as a jurisdictional utility subject to regulation by the Commission.

[2] The FERC is the successor to the FPC.

2. Nebraska State Natural Gas Regulation Act Jurisdictional Issues.

The SNGRA excludes "interstate pipelines" from regulation by the Commission, defining "interstate pipelines" by reference to whether the pipeline is subject to FERC jurisdiction. SNGRA § 2(8), NEB. REV. STAT. § 66-1802(8) (2006). Exemption of a "Hinshaw" pipeline from federal regulation creates no "regulatory gap" because the pipeline is regulated at the state level. Likewise, regulation of Hinshaw pipelines in Nebraska by the Commission presents no potential for conflict between federal and state regulation. A Hinshaw pipeline should therefore be deemed to be an "intrastate" pipeline *for purposes of the SNGRA* and thus a "natural gas public utility."

Coming full circle, however, whether the NRC Pipeline qualifies in the first instance as a Hinshaw pipeline turns on whether the Commission has regulatory jurisdiction over the NRC Pipeline's **rates**. Therefore, before considering the scope of the Commission's **certificate jurisdiction**, the scope of the Commission's **rate jurisdiction** must be examined.

Under the SNGRA, the Commission lacks rate jurisdiction over service to "high-volume ratepayers." SNGRA §§ 6 and 10, NEB. REV. STAT. §§ 66-1806 and 66-1810 (2006). Because the SNGRA authorizes the Commission to regulate the NRC Pipeline's rates to customers *other than* high-volume ratepayers, *e.g.*, municipalities and LDCs, the NRC Pipeline would qualify as Hinshaw pipeline with respect to service to those customers whose rates are subject to regulation by the Commission. However, the pipeline would **not** be classified as a Hinshaw pipeline **with respect to service to high-volume ratepayers.**[3] Thus, due to the limited scope of the

[3] If the Commission grants NRC a Certificate to operate the NRC Pipeline as a jurisdictional utility whose rates for service to customers (other than high-volume ratepayers) are subject to regulation by the Commission, NRC proposes to seek a "limited jurisdiction certificate" from the FERC under 18 C.F.R. § 284.224 (2007) to transport natural gas "in interstate commerce" on behalf of high-volume ratepayers whose rates are not subject to regulation by the Commission. This limited jurisdiction certificate would be required by the fact that NRC's rates for service to high-volume ratepayers would not be subject to regulation by the Commission and, therefore, the NRC Pipeline would not qualify as a Hinshaw pipeline

Commission's rate jurisdiction under the SNGRA and manner in which the Hinshaw exemption is crafted under the NGA, the NRC Pipeline would be a hybrid, part of whose services will be regulated at the state level (*i.e.*, NRC's service to LDCs and other customers that are not high-volume ratepayers), and part of whose services will be regulated at the federal level (*i.e.*, NRC's service to high-volume ratepayers).[4]

The discussion of the scope of the Hinshaw exemption in the pre-hearing Comments of Northern Natural Gas ("Northern") at pages 10-12 is fundamentally flawed. Northern claims that because NRC's rates to LDCs would be regulated by the Commission, NRC qualifies as a Hinshaw pipeline with respect to **all** its proposed transportation services, particularly that to high-volume ratepayers whose rates are exempt from regulation by the Commission under the SNGRA. Northern's contention that the Hinshaw exemption would apply NRC's service to high-volume ratepayers is fundamentally inconsistent with the statutory language and is unsupported by any case precedent.

It should be noted that many states have a long history of regulating both intrastate pipelines operating within the state, and pipelines which qualify as Hinshaw pipelines by reason of being subject to rate regulation by the state. Producing states, such as Texas, Louisiana, and Oklahoma, have intrastate pipelines subject to state-specific regulatory regimes. A number of states, which lack "intrastate pipelines," due to the absence of a local source of natural gas production within the state – a prerequisite to "intrastate pipeline" status, nevertheless have regulated Hinshaw pipelines.

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with respect to service for those shippers. Under 18 C.F.R. §§ 284.224(e) and 284.123(b)(1) (2007), NRC's rates for service to high-volume rate payers will be regulated by FERC by reference to NRC's state-regulated rates for "comparable service" to state-regulated customers.

[4] To complete the analysis, if the NRC Pipeline served **only** customers whose rates were regulated by the Commission, the Pipeline would be solely subject to regulation by the Commission and completely exempt from federal regulation as a Hinshaw pipeline. On the other hand, if the NRC pipeline served **only** high-volume ratepayers whose rates are statutorily exempt from regulation by the Commission, the NRC Pipeline would be exclusively subject to regulation by the FERC as an "interstate pipeline" under *East Ohio Gas Co.*

A useful comparison is to the regulatory regime of the State of Kansas, whose state regulatory statute was in some respects a model for the Nebraska legislature in enacting the SNGRA. The General Counsel for the Kansas Corporation Commission ("KCC") even testified before the Nebraska legislature regarding Kansas' regulatory statute. Kansas regulates pipelines such as the NRC Pipeline under a public convenience standard and regulates the rates of such pipelines under a just and reasonable rate standard. *See* K.S.A. § 66-104 (jurisdiction over intrastate pipelines as "public utility"); K.S.A. § 66-131 (requirement for certificate of public convenience and necessity from the KCC required in order to operate as a public utility); K.S.A. § 66-128a (requirement that public utility's rates be "fair and reasonable"); and K.S.A. § 66-154a (prohibition against "unreasonable, unfair, unjust or unjustly discriminatory or unduly preferential" rates or charges).

However, the conclusions that may be drawn from parallels between the SNGRA and other states' regulatory regimes are limited by the fact that the Nebraska SNGRA contains two provisions **unique** to Nebraska: (1) the exemption from regulation of rates charged to high-volume ratepayers (in most other states there is no statutory exemption for a particular class of customers); and (2) the "double piping" prohibition. It is not coincidental that two of the three threshold jurisdictional issues on which NRC sought rulings from the Commission involve those unique aspects of Nebraska state law.

In a different context, North Western Corporation's ("North Western") analysis of the scope of the Commission's jurisdiction over rates charged to high-volume ratepayers concludes that because a jurisdictional utility has the "option" to provide service to high-volume ratepayers at negotiated rates not subject to the Commission's jurisdiction, the rates charged by a jurisdictional utility to high-volume ratepayers therefore remain "subject to" regulation by this Commission. North Western Comments at 9.

NRC does not believe that the Commission's limited authority to require jurisdictional utilities to file their contracts with high-volume ratepayers, or even the Commission's authority "to investigate" those contracts, without authority to modify the rates charged thereunder, is tantamount to "regulation" of the rates charged by a jurisdictional utility to high-volume ratepayers.

North Western expresses concern that unless the Commission declares that the rates and facilities used to serve high-volume ratepayers are subject to regulation by the Commission, a "regulatory gap" will be created that FERC will fill. North Western Comments at 10. NRC believes this concern is misplaced; FERC's regulations provide a mechanism for light-handed regulation by FERC in the form of a limited jurisdiction certificate, 18 C.F.R. § 284.224 (2007), and for regulation of the jurisdictional utility's rates to high-volume ratepayers by reference to the rates of the jurisdictional utility "for comparable service" on file with this Commission. 18 C.F.R. §§ 282.224(e) and 284.123(b)(1) (2007). North Western is correct that a "regulatory gap" in the scope of the Hinshaw exemption would be created by the lack of Commission regulation over rates charged to high-volume ratepayers and would be filled by FERC. North Western Comments at 10. However, this consequence should not be one of great concern to the Commission as FERC's regulation will largely defer to the Commission's regulatory policies.

F. POST HEARING COMMENTS OF NRC ON ISSUES IDENTIFIED AS SUBJECTS OF THE INVESTIGATION.

1. Does The Definition Of "High-Volume Ratepayer" Include LDCs With Volumetric Demand In Excess Of 500 Therms Per Day?

ANSWER: NO.

The term "high-volume ratepayer" is defined in the SNGRA as a ratepayer whose daily "requirements" exceed 500 therms per day. SNGRA § 2(7), NEB. REV. STAT. § 66-1802(7) (2006). Under the SNGRA, the ratepayer's "requirements" are in turn determined by reference

to the ratepayer's average daily "consumption," *i.e.*, the average daily quantity of gas "consumed" by the ratepayer. *Id*. Consumption is "the use of a thing in a way that thereby exhausts it." Black's Law Dictionary 312 (Bryan A. Garner, *et al*. eds., 7th ed. 1999). An LDC does not "consume" the gas it purchases or transports (except, perhaps, some incidental consumption to fuel compressors used in the operation of the LDC's system). Rather, LDCs resell the gas to retail end-users for consumption by them. Because an LDC does not consume the gas, it has no daily "requirement" **within the meaning of the statutory definition** of high-volume ratepayers set forth in the SNGRA which ties "requirements" to "consumption." Therefore, **LDCs are not high-volume ratepayers under the SNGRA.**

Northern's pre-hearing Comments conclude that the definition of "high-volume ratepayer" can reasonably be read to include or exclude LDCs. NRC strongly disagrees with this assessment. Reading the definition of "high-volume ratepayer" as including LDCs would undermine the foundation of the SNGRA and frustrate attainment of the primary purposes of the legislation because the Commission would be without power to regulate the rates charged by LDCs to retail distribution consumers. Northern's contention that the Commission could "oversee the LDC's purchasing practices, thereby protecting retail customers, without specifically setting the rates charged by NRC to the LDC," Northern Comments at 6, is sorely mistaken. Northern ignores the fact that section 10 of the SNGRA, NEB. REV. STAT. § 66-1810 (2006), expressly excludes high-volume ratepayers themselves (and not merely the rates they are charged) from regulation by the Commission.

Similarly, Northern's suggestion that the operative term "consumption" be "equate[ed] to gas volumes delivered to an entity as measured at a meter," Northern Comments at 7, while novel, is clearly at odds with the legislative intent of section 10 of the SNGRA. Northern argues that an LDC could be considered a high-volume ratepayer because of the amount of gas which

flows through the meter. In other words, in Northern's view, the LDC does not have to "consume" 500 therms per day of gas for its own activities, it merely needs to receive this amount of gas. Northern arrives at this conclusion by stripping the term "consumption" of any meaning and effectively re-writing the statutory definition of "high-volume ratepayer."

If section 10 of the SNGRA were so construed, the legislature would have gone a long way to define high-volume ratepayers in a manner that conflicts with the remainder of the Act. Section 10 of the SNGRA should not be construed in a manner that threatens to frustrate attainment of the consumer-protection purposes of the legislation which are clear from the Act's legislative history. The legislative intent behind section 10 of the SNGRA, SNGRA § 10, NEB. REV. STAT. § 66-1810(1) (2006), is that the term high-volume ratepayer will apply to **end users** of gas. The logic behind the high-volume ratepayer exception is that large end users purchase enough gas and are sophisticated enough to reach their own bargain with natural gas public utility companies, and therefore, these users do not need state protection in the form of natural gas regulation. Floor Debate for 2003 Leg. Sess. 7602 (Ne. 2003) (During the legislative debate on LB 790, Senator Landis describes high-volume ratepayers as "really, really big, big users, who are very adroit–let's say Nucor Steel, at covering their costs.").

The legislative intent that the term "high-volume ratepayers" refers to end users and not to LDCs, is seen throughout the legislative debate on LB 790. On March 27, 2003, in discussing the high-volume ratepayer exception, Senator Landis refers to "large customers, like ethanol plants" as being the high-volume ratepayer this provision is meant to exempt. Floor Debate for 2003 Leg. Sess. 3047-3048 (Ne. 2003). Consequently, the legislative history of the SNGRA supports the conclusion that LDCs do not qualify as high-volume ratepayers.

In its Comments, Northern also suggested that an LDC could be considered a high-volume ratepayer with respect to the gas it receives for its own operations (assuming the 500

therm/day threshold is exceeded) and a jurisdictional utility with respect to the gas it receives for distribution purposes. At the hearing, Mr. Demarest presented two responses to this proposed statutory construction.

First, at least in this context, the high-volume ratepayer exemption should be applied on a facility-by-facility basis. Logic strongly supports this approach. For example, in many Roman Catholic and Episcopal dioceses all of the churches and related facilities, *e.g.*, church-owned rectories and schools, are owned by the Diocese rather than the individual parish congregations. Assuming that to be the case in Nebraska, it is likely that individually, few if any of these individual churches and related facilities will consume more than 500 therms per day on average. However, it is quite possible if not probable that if the individual consumption of these facilities were to be aggregated, based on the notion that the Diocese is the owner and, therefore, the true ratepayer (regardless of the address to which the bill may be sent for any individual facility), the *aggregate* average daily consumption of these facilities could exceed 500 therms. This would mean that the individual parishes served by LDCs throughout Nebraska, who are locally responsible for heating and paying the bills for their local churches, would be denied the rate protections of the SNGRA. NRC believes construction of the SNGRA should avoid any risk of such a result and, therefore, supports application of the high-volume ratepayer exemption on a facility-by-facility basis. Thus, even under Northern's view of the Act, unless an LDC used more than 500 therms per day of natural gas in a specific facility served by an intrastate pipeline, the LDC would not qualify as a high-volume ratepayer by reason of the consumption of gas at that LDC-owned facility.

Second, based on the commingling doctrine established in *California v. Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965) ("*Lo-Vaca*"), an LDC should not be considered a high-volume ratepayer with respect to the portion of the gas it receives for its own use and a

jurisdictional utility with respect to the gas it receives for resale or distribution. In *Lo-Vaca*, El Paso Natural Gas Company ("El Paso"), an interstate pipeline, bought gas from an intrastate supplier in Texas for the express purpose of using the gas to fuel El Paso's intrastate compressor stations located in the state of Texas. El Paso argued that the gas was intrastate gas, never flowed out of the state of Texas in interstate commerce, and therefore the rates paid for the gas were outside the scope of FERC's review. The Supreme Court held that once the Texas intrastate gas was commingled in the El Paso pipeline with gas flowing out of the state of Texas, all of the gas became subject to the FERC's jurisdiction. *Id*. The Supreme Court held that for jurisdictional purposes the gas El Paso acquired for its own use could not be distinguished from the gas El Paso acquired for interstate transportation and resale.

In this case, the gas required for an LDC's operations cannot be separated from the gas distributed and/or resold by the LDC to its retail customers. From the standpoint of the SNGRA, therefore, an LDC should not be viewed as a high-volume ratepayer with respect to any portion of its gas supplies. Rather the LDC should be viewed as a jurisdictional utility with respect to the entirety of the commingled gas stream transported for the LDC.

Finally, given the choice between treating an LDC as exclusively a high-volume ratepayer or exclusively as a jurisdictional utility, the obvious choice is a classification that furthers attainment of the purposes of the SNGRA rather than one which would render attainment of such legislative purposes impossible. This rationale supports a determination that LDCs are not high-volume ratepayers for purposes of the SNGRA.

2. Does Nebraska's "Double Piping" Prohibition Apply To A Pipeline Providing A New Interconnect To An LDC?

ANSWER: NO.

(a) The State's "double piping" prohibition does not apply to new pipeline delivery facilities serving LDCs.

In its orders under other double piping statutes, the Commission has described the double piping prohibitions as applicable to "redundant" facilities. In doing so, the Commission has applied the common dictionary definition of "redundant" to mean "exceeding what is necessary or normal: superfluous." *In the Matter of the Application of Peoples Natural Gas of Omaha, Nebraska, Seeking Resolution of a Dispute Under Nebraska Revised Statute Section 57-1306*, Application No. P-0003, at p. 8 (May 1, 2001). It is not at all abnormal for LDCs to have multiple interconnects with two or more different pipeline suppliers in order to adequately serve the needs of the LDC's customers, and to provide competitive supply options and enhanced reliability of service. Significantly, none of the Commission's orders addressing redundant piping under section 52 of the SNGRA, Neb. Rev. Stat. § 66-1852 (2006), or related statutes, indicates that the legislature intended for the "double piping" prohibition to apply to pipeline facilities for delivery of gas supplies to LDCs from an alternative provider.

In its Comments and at the hearing, Northern argued that even if the double piping statute itself didn't apply, the Commission must consider the state's public policy against construction of "redundant facilities" before issuing a Certificate of Public Convenience to NRC. Northern's position is contrary to broad public policy favoring competition. Northern would subject NRC to the state's putative "public policy" while Northern itself would remain beyond the reach of the very policy it praises. When asked by Commissioner Schram whether Northern has any "redundant piping," Northern's General Counsel, Mr. Porter, responded that while it "may have facilities that are in proximity" with existing LDC-owned lines, "there isn't anything that would be subject to the double-piping law" because as a FERC-regulated entity Northern is not subject to the Nebraska double-piping prohibition. Commission Hearing Transcript at 106 (NG-0051/PI-130). The Commission should not be swayed by Northern's argument that the public interest in preventing redundant piping should prohibit certification of the NRC pipeline.

With respect to safety, the Commission has expressed concern that duplicative piping in an area poses the potential to slow the response to a natural gas leak or emergency and increases the investigative time to determine the cause or location of such a leak. While that concern may be valid where a network of small diameter local mains serves multiple residential and small commercial customers, similar concerns do no apply to comparatively large diameter, high-pressure lines flowing to a Town Border Station. Among other reasons, the pressure in such mainline facilities is constantly monitored and safety devices, that are not practical for application to a grid comprised of multiple small diameter mains, can be utilized to rapidly detect leaks and automatically shut-off gas flow if a leak is detected.

The Commission has also acknowledged that limiting competition may not provide the consumer with the most cost-efficient choice. *In the Matter of the Application of Metropolitan Utilities District*, 2001 Neb. PUC LEXIS 163 (2001). Nevertheless, the Commission has expressed the desire to protect ratepayers from duplicative piping because the incumbent utility's costs must be spread over a smaller customer base if duplicate pipeline facilities are permitted to lure away existing customers of the incumbent utility. *In the Matter of the Application of Metropolitan Utilities District*, Application No. P-0005 (2002). However, these concerns do not apply to a newly constructed pipeline, such as the NRC Pipeline, serving LDCs in Nebraska because the entities losing their historic customers are interstate pipelines **which the Commission has no regulatory responsibility to protect** from competition benefiting Nebraska LDCs and their customers.[5]

The conclusion that the State's double piping prohibition does not apply to construction of new pipeline delivery points to LDCs is also consistent with the Commission's recent decision applying Neb. Rev. Stat. §§ 57-1301 *et seq.* (2006). *In the Matter of the Application of Aquila,*

[5] If interstate pipelines wish to seek protection from the competition provided by the NRC Pipeline, the forum in which they should seek such protection is the FERC, not this Commission.

Inc., 2006 Neb. PUC LEXIS 242 (2006). In that case, the Commission examined the root of the prohibition on "double piping." Both the complainant, Aquila, and the Metropolitan Utility District ("MUD") had significant infrastructure in place near the disputed service area. The Commission found that MUD would have to traverse Aquila's main to serve the disputed area, which was immediately adjacent to Aquila's mains. The Commission found that MUD's potential service would not contribute to orderly development and rejected MUD's planned expansion. By comparison, construction of a limited number of geographically dispersed lines serving LDCs at Town Border Stations and large industrial plants would not "create a potential labyrinth of natural gas infrastructure" that would "render the requirement of orderly development meaningless." *Id.* at 246.

Thus, neither the considerations previously relied upon by the Commission in applying Nebraska statutory double piping prohibitions under section 52 of the SNGRA, Neb. Rev. Stat. § 66-1852 (2006), or related statutes, nor the apparent legislative purpose of the double piping prohibition, supports application of the prohibition to ***new*** pipeline delivery points to an LDC. None of the Commission orders addressing redundant piping under section 52 of the SNGRA, Neb. Rev. Stat. § 66-1852 (2006), or related statutes, indicates that the legislature intended for the "double piping" prohibition to apply to pipeline facilities for delivery of gas supplies to LDCs from an alternative provider. Similarly, no public policy interest of the State of Nebraska supports applying the double piping prohibition to pipeline facilities for delivering gas supplies to LDCs in Nebraska from an alternative supply source.

The LDCs who will comprise a significant portion of NRC's customer base will receive competitively priced natural gas transportation service under negotiated rates that protect them and their customers. The incumbent transportation service providers who would be affected by construction of the NRC Pipeline's new delivery points to LDCs in Nebraska are interstate

pipelines (*e.g.*, KMIGT and Northern) whose contractual arrangements with the LDC customers of NRC are limited or have expired. Clearly the State of Nebraska has little public policy interest in protecting interstate pipelines, who are regulated by the FERC and over which the Commission has no jurisdiction, from by-pass that ultimately benefits LDCs and their customers in Nebraska. While the State of Nebraska has an interest in preventing economically wasteful competition among LDCs and other intrastate suppliers in the state, the State of Nebraska has no public policy interest:

> (i) in preventing Nebraska LDCs from improving the reliability of the LDC's gas supplies (and thereby enhancing the reliability of the LDC's service to high-priority retail customers) through an interconnect with another pipeline supplier;
>
> (ii) in preventing Nebraska LDCs from accessing competitive gas supplies (for the benefit of the LDC's retail customers) by connecting to a different interstate pipeline; or
>
> (iii) in protecting the interstate pipeline currently serving the LDC from competition from other interstate suppliers.

Accordingly, the double piping prohibition should **not** preclude the Commission from granting NRC a Certificate under section 53(1) of the SNGRA, Neb. Rev. Stat. § 66-1853(1) (2006), to serve LDCs in Nebraska.

(b) Federal preemption principles would ultimately foreclose application of the state's "double piping" prohibition to NRC's facilities serving LDCs.

If the state's double piping prohibition were construed by the Commission as applicable to a new pipeline delivery point to an LDC, that determination could ultimately be rendered ineffective. If the Commission construed the state's double piping prohibition as applicable to the NRC Pipeline facilities delivering natural gas to LDCs, NRC would be compelled to abandon its effort to obtain a certificate from the Commission under the SNGRA. As explained above, depending on timing, NRC could instead have sought a certificate from the FERC under the

NGA. In as much as federal preemption principles would preclude application of the state double piping prohibition to federally certificated NRC Pipeline facilities, as explained below, any determination by the Commission that the state's double piping prohibition applied to a new pipeline delivery point to an LDC would be rendered moot under such circumstances.

Federal preemption ultimately turns on Congressional intent, either express or implied. Congress often explicitly states how and by what means "its enactments pre-empt state law." *See, e.g. Shaw v. Delta Air Lines, Inc.* 463 U.S. 85, 95-96 (1983). Congress may also intend to occupy a certain field to the exclusion of state law without expressly stating so. This intent may reasonably be inferred where the "pervasiveness of federal regulation precludes supplementation by the States, where the federal interest in the field is sufficiently dominant, or where 'the object sought to be obtained by the federal law and the character of the obligations imposed by it . . . reveal the same purpose'." *Schneidewind v. ANR Pipeline Company*, 485 U.S. 293, 299-300 (1988) ("*ANR*"), citing *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). In addition, state law is preempted when it is impossible to comply with both federal and state law, or the state law impedes compliance with the federal law. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963); *Hines v. Davidowitz*, 312 U.S. 572, 581 (1941).

The NGA was enacted by Congress in order to fill a "regulatory gap" created by Supreme Court decisions finding the States without power to regulate aspects of interstate commerce under the so-called "dormant" Commerce Clause, U.S. Const. Art. I, § 8, cl. 3.[6] *See* H.Rep. No. 709, 75th Cong., 1st Sess., 1-2 (1937) (citing *Missouri v. Kansas Natural Gas Co.*, 265 U.S. 298 (1924), and *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927)

[6] The dormant Commerce Clause prevents the States from imposing direct burdens on interstate commerce even where the Congress has not chosen to impose federal regulation. *See, e.g., Attleboro Steam,* 273 U.S. at 89; *New York v. FERC*, 535 U.S. 1, 5-6 (2002); *The Minnesota Rate Cases*, 230 U.S. 352, 396-7 (1913).

("*Attleboro Steam*").[7] The NGA conferred exclusive jurisdiction upon the FPC, and later, FERC, over the transportation of natural gas in interstate commerce. *Northern Natural Gas Co. v. State Corporation Commission of Kansas*, 372 U.S. 84, 91 (1963), quoting *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 682 (1954). "Congress intended for the field of . . . interstate transportation to be regulated exclusively at the federal level . . .." *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U.S. 507, 514-516 (1947); *ANR*, 485 U.S. at 305-06. It is therefore well settled that the NGA occupies the field of interstate transportation to the exclusion of state regulation. *ANR*, 485 U.S. at 306.

In *ANR*, the Michigan Public Service Commission ("Mich. P.S.C.") sought review by the Supreme Court of the Sixth Circuit's holding that the NGA preempts Michigan Act 144, which required a public utility to obtain Mich. P.S.C. approval before issuing long-term securities. The Supreme Court explained that when a form of state action is not expressly pre-empted by the NGA, in order to determine whether the action is nevertheless preempted, the Court evaluates whether the state's action "amounts to a regulation in the field of gas transportation . . . that Congress intended FERC to occupy." *ANR*, 485 U.S. at 304.

The Mich. P.S.C. maintained that the purposes of Michigan Act 144 were to: (i) prevent overcapitalization, which could threaten reasonable rates; (ii) prevent a company from taking on so much debt that it is unable to maintain its Michigan facilities properly; and (iii) prevent a utility from raising its equity to a level that will result in higher rates. *Id*. at 307. The Supreme Court concluded that "the things Act 144 regulation is directed at, the control of rates and facilities of natural gas companies, are precisely the things over which FERC has comprehensive authority." *ANR*, 485 U.S. at 308. The Supreme Court held that the NGA preempts Michigan Act 144. *Id*. at 310. The Supreme Court added, "Our conclusion that Act 144 seeks to regulate a

[7] This regulatory gap is frequently described as the "*Attleboro* gap" after the case giving rise to it.

field that the NGA has occupied also is supported by the imminent possibility of collision between Act 144 and the NGA." *Id*. at 309.

Similarly in *Michigan Consolidated Gas Co. v. Panhandle Eastern Pipe Line Co.*, Panhandle Eastern Pipe Line Co. ("Panhandle") received a certificate of public convenience and necessity under the NGA to by-pass Michigan Consolidated Gas Company ("MichCon") in order to provide natural gas directly to National Steel Corporation ("National Steel"), a customer of MichCon. *Michigan Consolidated Gas Co. v. Panhandle Eastern Pipe Line Co.*, 887 F.2d 1295 (6th Cir. 1989) ("*Michigan*"). MichCon argued that Panhandle should be enjoined from by-passing MichCon because Panhandle could not deliver gas to National Steel without the Mich. P.S.C.'s approval.

The Sixth Circuit held that Panhandle's delivery of natural gas to National Steel involved interstate transportation of natural gas and not local distribution. *Michigan*, 887 F.2d at 1300. Relying on *ANR*, the Sixth Circuit held that "this case involves the imminent possibility of a 'collision' between state and federal regulatory power that would disrupt [the NGA's] comprehensive scheme." *Michigan*, 887 F.2d at 1301. If the Mich. P.S.C. denied Panhandle's by-pass, then state and federal regulations would be in conflict. Consequently, the Sixth Circuit held that the NGA pre-empted regulation of Panhandle's bypass by the Mich. P.S.C. *Id*. at 1302.

Thus, it is beyond dispute that if the NRC Pipeline were certificated as an interstate pipeline subject to regulation by the FERC under the NGA, the "imminent possibility of a collision" between the state's double piping prohibition and the FERC's certificate of public convenience and necessity would result in federal preemption of Nebraska's double piping prohibition. However, the potential conflict between federal and state law (and preemption of Nebraska's double piping prohibition) will be avoided if Nebraska's double piping prohibition is construed, as NRC believes it should be, as **not** applicable to service by a pipeline to an LDC.

In any event, fealty to a supposed state legislative policy embodied in the double piping prohibition contained in the SNGRA should not cause the Commission to reject NRC's proposed construction of the SNGRA's double piping prohibition because such action could ultimately prevent the NRC Pipeline project from being constructed – a consequence that most certainly is not in the public interest of Nebraska.

(c) Whether the state's "double piping" prohibition applies to NRC's proposed service to high-volume ratepayers is not relevant to this proceeding.

Whether the state's double piping prohibition applies to end-user owned delivery lines is not a determination the Commission needs to make in addressing the separate question of whether the double piping prohibition applies **to LDCs**. Nor is it necessary for the Commission to consider whether the state's double piping prohibition applies to end-user owned delivery lines in ultimately deciding whether to issue a Certificate for the NRC Pipeline project. Indeed, whether the state's double piping prohibition applies to end-user owned delivery lines is not a consideration the Commission should take into account in this proceeding because the only service NRC proposes to conduct as a "jurisdictional utility" subject to regulation by the Commission is service to LDCs.

Because the jurisdiction of the Commission does not extend to the rates charged by NRC to high-volume rate payers, NRC Pipeline's Hinshaw exemption is limited to transportation of natural gas to LDCs and other ratepayers over which the Commission exercises ratemaking authority. In order to transport natural gas in interstate commerce for delivery to high-volume rate payers, NRC will be required to obtain federal certificate authorization. NRC intends to do so by seeking a "limited jurisdiction certificate" from the FERC under 18 C.F.R. § 284.224 (2007). This regulatory provision is specifically designed to deal with situations such as this where federal authorization is required under the NGA but the federal interest in regulation is

small. In connection with that limited jurisdiction certificate, NRC will also request a limited "blanket" certificate from the FERC under 18 C.F.R. §§ 157.203(b), 157.208 and 157.211(a) (2007) authorizing NRC to construct and operate the delivery taps, meters and related facilities needed to deliver natural gas to high-volume ratepayers, subject to regulatory conditions and limitations the details of which are not pertinent to this discussion.

One aspect of the proposed federal blanket certificate process warrants comment however. It must be recognized that a fundamental difference exists between an ordinary NGA Section 7(c) certificate authorizing construction of new pipeline facilities and the blanket certificate proceedings NRC proposes to employ. A regular Section 7(c) certificate proceeding for authorization to construct new pipeline facilities involves significant environmental reviews which extend the period for regulatory approval many months. By comparison, the blanket certificate authorizations NRC plans to seek under Sections 157.203(b), 157.208, 157.211(a) and 284.224 of the regulations of the FERC are routinely issued in a far shorter period than that routinely required to process a regular NGA Section 7(c) certificate application. Thus, the timing concerns that now foreclose the regular NGA Section 7(c) option do not apply to NRC's plan to seek supplemental blanket certificate authorization for service and facilities to serve high-volume ratepayers.

Because the construction and operation of NRC's facilities to serve high-volume ratepayers, *i.e.*, large end-users, will be authorized under a certificate issued under the NGA (albeit one in which the FERC asserts only "limited" regulatory jurisdiction), the NGA will preempt application of the state's double piping prohibition to NRC's facilities and activities covered by the federal certificate. *Board of Water, Light and Sinking Fund Commissioners v. FERC,* 294 F.3d 1317, 1327 (D.C. Cir. 2002); *Cascade Natural Gas Corp. v. FERC,* 955 F.2d 1412, 1419 (10th Cir. 1992); *Michigan Consolidated Gas Co. v. FERC,* 883 F.2d 117,121-22

(D.C. Cir. 1989); *Michigan Consolidated Gas Co. v. Panhandle Eastern Pipe Line Co.*, 887 F.2d 1295, 1300 (6th Cir. 1989). In *P.U.C. of California v. FERC*, 900 F.2d 269 (D.C. Cir. 1990), the D.C. Circuit addressed a modern application of *East Ohio Gas* to the situation where the end-user owns the gas and uses the pipeline solely for transportation. The D.C. Circuit held that the NGA preempts the State's authority while the gas is flowing in the high-pressure delivery line to the end-user's plant. *Id.*, 900 F.2d at 277.

SourceGas asserts that the Commission "should not accept limitations" on its ability to regulate the NRC Pipeline as a jurisdictional utility. SourceGas Comments at 3 and 6. However, any limitations on the Commission's regulatory jurisdiction are neither imposed by NRC nor "accepted" by the Commission. Rather, these limitations are the legal consequence of the scope of the Commission's jurisdiction under the SNGRA and application of federal preemption principles over which neither NRC nor the Commission has control.

SourceGas cites *Panhandle Eastern Pipeline Co. v. Michigan Public Service Commission*, 341 U.S. 329, 334 (1951), for the proposition that "[d]irect **sales** for consumptive use were designedly left to state regulation." SourceGas Comments at 5 (emphasis added). However, the only service NRC proposes to provide to customers in Nebraska will be a **transportation** service. Whatever the law may be under *Panhandle Eastern* respecting direct **sales,** that precedent has no application where interstate **transportation service** is provided. Likewise, there is absolutely no risk of NRC contending that NRC's "actual **sales** to customers in Nebraska are regulated by FERC (emphasis added)," when NRC proposes to make no sales to customers in Nebraska.

As NRC's Comments indicated, the application of federal preemption principles is both complex and dictated in the first instance by the narrow scope of the Commission's own jurisdiction (or lack thereof) over rates charged to high-volume ratepayers. Thus, NRC does not

disagree with SourceGas that it would be preferable for the NRC Pipeline to be "subject, wholly and not partially, to the Commission's jurisdiction," SourceGas Comments at 3, but that is an issue directed at the legislature, not the Commission, requiring as it would a change in the SNGRA respecting the Commission's jurisdiction over rates charged to high-volume ratepayers. As long as the Hinshaw exemption in section 1(c) of the Natural Gas Act, 15 U.S.C. § 717(c), and the SNGRA are written as they are, potential shared jurisdiction over the NRC Pipeline is a fact of life which the Commission and the people of Nebraska are better served by recognizing than by ignoring.

The application of the double piping prohibition to facilities serving high-volume ratepayers **is not relevant to the jurisdictional issues posed in this Investigation**. NRC requests the Commission to affirm that Nebraska's prohibition against "double piping" under SNGRA section 52, NEB. REV. STAT. § 66-1852 (2006), **does not apply** to a new pipeline interconnect **to an LDC** already served by an interstate pipeline.

3. Does The Commission Have Jurisdiction Over An Application For A Certificate Of Public Convenience To Operate, As A "Jurisdictional Utility," A Pipeline Located Wholly Within The State Of Nebraska To Deliver Natural Gas To LDCs And Other Customers?

ANSWER: YES.

To determine the scope of the Commission's certificate jurisdiction, the SNGRA must be construed as a whole. Specifically, the certification provisions of section 53(1) of the SNGRA, NEB. REV. STAT. § 66-1853(1) (2006), must be evaluated in light of section 56 of the SNGRA, NEB. REV. STAT. § 66-1856 (2006), and the definitions set forth in section 2 of the SNGRA, NEB. REV. STAT. § 66-1802 (2006).

Under section 53(1) of the SNGRA, "no jurisdictional utility shall transact business in Nebraska until it has obtained a certificate from the commission that public convenience will be

promoted by the transaction of the business and permitting the applicants to transact the business of a jurisdictional utility in this state." SNGRA § 53(1), NEB. REV. STAT. § 66-1853(1) (2006). On the other hand, section 56 allows "jurisdictional utilities" to construct new facilities without obtaining prior certification. SNGRA § 56, NEB. REV. STAT. § 66-1856 (2006). Giving meaning to section 53(1) requires that that section be read as granting the Commission certificate authority over new "natural gas public utilities," while section 56 gives "jurisdictional utilities," (*i.e.*, those that have already been certified as serving the public convenience or that were "grandfathered" under section 53(2) of the SNGRA, NEB. REV. STAT. § 66-1853(2) (2006), as jurisdictional utilities in operation on enactment of the SNGRA,) the right to construct new facilities without being required to obtain certification of the new facilities from the Commission.

The interplay between sections 53(1) and 56 leads to the conclusion that as a Hinshaw pipeline and, therefore, an "intrastate" pipeline for purposes of the SNGRA, the NRC Pipeline would be initially classified as a "natural gas public utility" under the SNGRA, until certified as a "jurisdictional utility" by the Commission under section 53(1). Accordingly, NRC must apply for a certificate of public convenience under section 53(1) of SNGRA to be classified as a jurisdictional utility prior to "transact[ing] . . . business of a jurisdictional utility" in Nebraska. NEB. REV. STAT. § 66-1853(1) (2006).

In keeping with this analysis, NRC would not be a "jurisdictional utility" prior to receiving certification as such under section 53(1). Implicitly, and notwithstanding section 56, NRC would not be permitted to commence construction of the NRC Pipeline prior to obtaining such certification from the Commission. Indeed, even without consideration of the interplay between section 53(1) and section 56, the "transaction of business as a jurisdictional utility" logically encompasses construction of pipeline transportation facilities, an activity in which NRC

may not engage prior to receiving a certificate of public convenience from the Commission as a "jurisdictional utility" under section 53(1) of the SNGRA.

Based upon the foregoing, NRC requests the Commission to affirm that the Commission possesses jurisdiction to consider an Application from NRC for a Certificate of Public Convenience to operate, as a "jurisdictional utility," a pipeline located wholly within the state of Nebraska to deliver natural gas to LDCs and other customers.

Cornerstone, in a futile attempt to prevent the Commission from exerting jurisdiction, argues that on the face of the statute the SNGRA does not apply to NRC. First, Cornerstone contends that the definition of a "natural gas public utility," NEB. REV. STAT. § 66-1804 (2006), "does not clearly include an intrastate pipeline." Cornerstone Comments at 5. Cornerstone's argument can only be described as a semantic game. After acknowledging that the focus of the definition of public utility is on "entities" that "operate . . . equipment . . . used for the conveyance of natural gas through pipelines in or through any part of the state," Cornerstone concludes, somewhat incongruously, that "[t]his definition does not appear to include **the actual pipeline itself** in the definition of a natural gas public utility." Cornerstone Comments at 5-6 (emphasis added). Under Cornerstone's literalist approach, a local distribution system would not be a natural gas public utility, although the "entity" (the LDC itself) that owns or controls the local distribution system **is** a natural gas public utility. By the same logic, the entity, in this case NRC, that would own the pipeline **would be** a "natural gas public utility" even if the facility itself, *i.e.*, the pipeline, is not. Accordingly, Cornerstone's conclusion that "the Commission may lack jurisdiction over an intrastate pipeline," (meaning the physical pipe in the ground), Cornerstone Comments at 6, is truly **irrelevant** and by Cornerstone's own logic has no bearing on whether the Commission has jurisdiction over NRC as the entity that will own and operate the NRC Pipeline as "equipment . . . used for the conveyance of natural gas through pipelines in or

through any part of the state."

Cornerstone also suggests that, because the legislature did not incorporate into the SNGRA, provisions similar to those in other states expressly regulating intrastate pipelines, the SNGRA should not be construed as applicable to NRC or to the NRC Pipeline project. Cornerstone Comments at 6. In this regard it should be noted that the NRC Pipeline will not be an "intrastate" pipeline in the conventional sense. While located wholly within Nebraska, and therefore, "intrastate" in that respect, in fact the NRC Pipeline will receive all of its gas from interstate pipelines and will be part of the interstate natural gas pipeline system. To be a "conventional" intrastate pipeline, like those regulated as such (rather than as Hinshaw pipelines) in other states, requires a source of gas supply indigenous to the state. Unlike Kansas, Colorado and Wyoming, contiguous states with indigenous gas supplies and conventional intrastate pipelines, Nebraska has no indigenous gas production located within the state and, therefore, no conventional intrastate gas pipelines.

However, that fact does not mean that this Commission should not regulate the NRC Pipeline as a Hinshaw pipeline. The transportation services to be rendered by NRC to LDCs is an activity of primarily local concern and, therefore, should be regulated at the State rather than the federal level.

Obviously, Cornerstone has a clear preference for the Commission to refrain from exercising its jurisdiction in order that the NRC Pipeline may be regulated by FERC. While that result is a possibility, it is not the approach preferred by NRC. This preference should be seen for what it is – an effort to kill the NRC Pipeline project because the FERC regulatory process is simply no longer viable.

Second, Cornerstone argues that the Nebraska Pipeline Carriers Act ("NPCA"), NEB. REV. STAT. § 75-501 (2006), *et seq.*, and not the SNGRA governs intrastate natural gas pipelines.

Commission Hearing Transcript at 109-110 (NG-0051/PI-130). The premise underlying Cornerstone's argument is that an intrastate pipeline can only be governed by either the SNGRA or the NPCA. Cornerstone argues that because the NRC Pipeline would satisfy the definition of a "pipeline carrier" under the NPCA, NRC cannot be a "jurisdictional utility" under the SNGRA. Cornerstone's premise is false and its argument is flawed.

When the SNGRA was enacted, numerous statutes were amended and revised to reflect the implementation of the SNGRA. One of those statutes, NEB. REV. STAT. § 75-109.01 (2006), as amended by the SNGRA, provides that the Commission shall have jurisdiction over "[p]ipeline carriers" pursuant to both the SNGRA and the NPCA. NEB. REV. STAT. § 75-109.01 (2006). Consequently, contrary to Cornerstone's contention, "common carriers" are regulated by the Commission under both the SNGRA and NPCA.

Furthermore, both logic and basic rules of statutory construction support the conclusion that intrastate pipelines can be regulated by both the SNGRA and the NPCA. Recognized principles of statutory construction require that two statutes dealing with the same subject matter be read in harmony with one another. 82 C.J.S., Statutes § 352 (2007). In this case, there is no reason, especially in light of the express language of Section 75-109.01, that an intrastate pipeline should not be deemed to be a "common carrier" subject to the NPCA as well as a facility operated by a "jurisdictional utility" subject to the SNGRA.

The NPCA and the SNGRA deal with different subjects. The NPCA is purely a safety statute, requiring "common carriers" (which may be a broader category of pipelines than those regulated under the SNGRA) be periodically inspected. The SNGRA deals with the circumstances under which such pipelines should also be regulated as public utilities. Not only is there no conflict, but the Commission's regulation of common carriers under the NPCA and the Commission's regulation of natural gas public utilities under the SNGRA complement one

another. An artificial conflict should not be created where none already exists.

North Western Corporation ("North Western") initially expressed concern that "the instant investigation may not be the appropriate procedural vehicle in which to make a preliminary ruling on NRC's future application under § 66-1853(1)." North Western Comments at 4. The Commission's explanation that "no decision in this docket will have any bearing on the question of whether a pipeline should or will be constructed," Commission Hearing Transcript at 8 (NG-0051/PI-130), along with Mr. Brooks statement that this "is not an evidentiary hearing about a proposed pipeline," Commission Hearing Transcript at 12 (NG-0051/PI-130), appear to have addressed North Western's concerns.

Laboring under the same misconception as North Western that this hearing will address the merits of NRC's proposed pipeline, Cornerstone's Comments raised issues relating to whether the proposed NRC Pipeline would be "used" and "useful." Cornerstone Comments at 3. Those concerns are necessarily premature. These issues should properly be the subject of the public convenience determination the Commission would be required to make in connection with a formal Application by NRC for a certificate of public convenience under section 53(1) of the SNGRA, NEB. REV. STAT. § 66-1853(1) (2006).

Nevertheless, the contention in Cornerstone's Comments (at p. 3) that "Nebraska is currently being efficiently and effectively served by its existing pipelines and natural gas companies, making it difficult to understand what, if any, the need is for an intrastate pipeline," warrants brief comment. While not technically before the Commission in this Investigation, Cornerstone's contention is relevant to assessing Cornerstone's credibility and the weight to be accorded Cornerstone's Comments. The need for a pipeline such as that proposed by NRC was quite eloquently put forth by several witnesses at the hearing, including the Hon. Gordon Adams, Mayor of Norfolk, Nebraska, the Hon. Mike Flood, Speaker of the Nebraska Unicameral, Mr.

R.J. Baker, Executive Director of Elkhorn Valley Economic Development Council and others, concerning the inadequacy of interstate natural gas delivery capacity to Cities in North-Central Nebraska. See Exhibit A to these Post Hearing Comments, Article from *The Omaha World* concerning Norfolk's loss of industry due to inadequate gas supply.

4. What Other Regulatory Authorities, Including State, Federal And Local Governing Bodies Of Any Kind, Would Have Jurisdiction Over The NRC Pipeline, And What Is The Scope Of Their Review?

Attached hereto as Exhibit B is a Table summarizing the State, Federal and local governing bodies with jurisdiction over the NRC Pipeline. In most cases, the applicable governing body has responsibility for reviewing and permitting the NRC Pipeline project for compliance with specific regulatory requirements, often environmental in character. In many instances the jurisdiction of the agency is limited to the permitting and construction stage and does not extend into operation. Frequently there is substantive subject matter overlap between the federal and state agencies. Many of the significant permitting processes are described in detail below.

(a) Non-utility regulatory bodies.

The Army Corp. of Engineers must grant NRC a Section 404 permit under the Clean Water Act ("CWA") before NRC may construct across jurisdictional waters of the United States, including traditional navigable waters or streams, relatively permanent waters, and adjacent wetlands with a significant nexus to navigable waters. The most substantial such crossing is that proposed for the Platte River located on the border between Colfax and Butler Counties, Nebraska (approximately 2 miles east of Columbus, Nebraska). NRC will be required to submit for review by the Corp. of Engineers detailed engineering plans for precisely how NRC will construct each jurisdictional crossing and what mitigation measures NRC will take to minimize the potential environmental consequences of the crossings prior to receiving a Section 404

permit.

The Nebraska Department of Environmental Quality ("NDEQ") also has regulatory roles to play under the CWA. The NDEQ administers the Section 401 Water Quality Certification Program in accordance with Section 401 of the Clean Water Act. This program evaluates applications for federal permits and licenses that involve a discharge to waters of the state and determines whether the proposed activity complies with Title 117 – Nebraska Surface Water Quality Standards. If the activity is likely to violate the standards, certification may be denied or, alternatively, conditions for complying with the standards may be imposed on the certification. The U.S. Army Corps of Engineers Section 404 Dredge and Fill Permits and FERC certificates under the Natural Gas Act are examples of federal regulatory programs that require State Water Quality Certification before the federal permits or licenses can be issued.

Pursuant to the U.S. Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), the Corp of Engineers' regulatory jurisdiction does not extend to isolated, non-navigable intrastate waters where the only link to interstate commerce is the use of the waters by migratory birds. Therefore no permit or other authorization by the Corps of Engineers is required for projects that might impact such isolated, non-navigable intrastate waters.

However, all waters of the State of Nebraska, including isolated waters, are still under the authority of the NDEQ and projects impacting those waters must meet the anti-degradation requirements of Title 117 – Nebraska Surface Water Quality Standards. For example, many traditional rainwater basins important to migratory waterfowl would be considered isolated waters of the State and would not require a Section 404 permit. However, a project may not degrade those waters if it is to meet Title 117 requirements.

The NDEQ also administers the National Pollution Discharge Elimination System

("NPDES") program and issues permits under the CWA for storm water discharge associated with construction activities. The NDEQ will also review NRC's Substitute Water Supply Plan in connection with hydrostatic testing of the NRC Pipeline and is responsible for issuance of an Industrial Wastewater Discharge Permit for disposal of the hydrostatic test water. Furthermore, as with any facility, permits will be required from the NDEQ prior to beginning construction or operation. These include Air Quality Construction, Open Burning, Integrated Solid Waste Management, and Dust Emission permits (Title 129, chapter 32).

A number of other state and federal agencies are also involved in consultative processes related to the pipeline construction projects generally. The U.S. Fish & Wildlife Service ("F&WS") provides consultative clearance under Section 7 (a)(2) of the Endangered Species Act ("ESA") to threatened or endangered species or critical habitat which may be adversely affected by pipeline construction, as well as suggesting avoidance, minimization, or mitigation measures where critical habitat is threatened. Pursuant to Section 7 of the ESA, every federal agency, in consultation or conference with the F&WS, is required to ensure that any action the federal agency authorizes, funds, or carries out is not likely to jeopardize the continued existence of any federally listed or proposed species and/or result in the destruction or adverse modification of designated and/or proposed critical habitat.

Paralleling F&WS' review, the Nebraska Game and Parks Commission will also review NRC's proposed construction plans to determine whether the proposed construction will have any adverse impact on any state listed threatened or endangered species or critical habitat.

The Nebraska State Historical Preservation Office ("SHPO") will play a consultative role under Section 106 of the National Historic Preservation Act. NRC will be required to implement procedures for identifying objects of potentially historic or archaeological significance discovered during construction and for preservation of such objects and notification of the SHPO

whenever any such object is encountered. Similarly, the Natural Resources Conservation Service of the U.S. Department of Agriculture will be consulted regarding the potential impact of the project on farmland.

Another specialized or focused review will be performed by the Nebraska State Fire Marshall who will review NRC's plans for compliance with State and Federal fire safety standards and requirements.

A separate set of approvals must be obtained, both at the state and local levels, for road and highway crossings. Thus, the Nebraska Department of Roads ("NDOR") will issue permits authorizing the pipeline's right-of-way to encroach upon the highway right-of-way, as well as permits for crossing state highways and Interstate 80. County permits to cross county road(s) will be required to be issued by Clay, Hamilton, York, Polk, Platte, Butler and Colfax Counties. These same counties will also be responsible for issuance of any County Floodplain Construction Permits authorizing construction of the NRC Pipeline in floodplains.

(b) Public utility regulatory bodies – FERC and Nebraska Public Service Commission.

Perhaps the broadest regulatory review is that conducted by the Commission and/or by FERC, depending on how the jurisdictional status of the NRC Pipeline is structured.

(i) Federal Energy Regulatory Commission.

The FERC reviews applications for approval to construct and operate interstate pipeline facilities under Section 7(c) of the NGA, 15 U.S.C. § 717(f). Under NGA Section 7(c), the FERC applies a broad "public interest" standard to determine whether the "public convenience and necessity" will be served by the proposed facilities and/or service. *Cascade Natural Gas Corp. v. FERC*, 995 F.2d 1412, 1421 (10th Cir. 1992) (In making the determination whether a proposed project "is or will be required by the . . . public convenience and necessity," the FERC "must consider **all factors bearing on the public interest**, not simply those immediately relating

to the objects of its jurisdiction." (emphasis added)), citing *Atlantic Refining Co. v. Public Service Comm. of N.Y.*, 360 U.S. 378, 391 (1959).

In connection with its review under NGA Section 7(c), the FERC examines a wide range of information and data pertinent to the public interest standard. This information relates to the applicant and its ability to perform the services for which a certificate is requested, as well as to the engineering and economic aspects of the proposed facilities and services.

Of particular significance, under the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4321, *et seq.* (2000), the FERC conducts an environmental review of proposed projects to determine whether the issuance of a federal certificate for the project constitutes a "major federal action affecting the environment." In most instances this review includes consideration of a range of environmental factors, including the potential effect of the project on wetlands and endangered species and their habitat, the effect of the project on air and water quality, the effect of the project on land use and public health and safety, and consideration of potential mitigation measures to moderate or reduce any adverse effects identified.

In the majority of cases, FERC's environmental review culminates in preparation of a written Environmental Assessment ("EA"). Where the EA concludes that FERC's action would constitute a major federal action affecting the environment, FERC proceeds to conduct a more thorough analysis of the environmental costs, mitigation measures and countervailing non-environmental benefits from the regulatory action, culminating in publication of a detailed Environmental Impact Statement ("EIS"). The EA or the EIS, whichever may be the case, is taken into account by the FERC in deciding whether to approve the proposed project or service under the public convenience and necessity standard of the NGA.

If NRC were to file an Application for a Certificate of Public Convenience and Necessity from the FERC, it is anticipated that FERC would conduct an environmental review of the

proposed NRC Pipeline that would culminate in production of an EA (but not an EIS).

FERC would also regulate the rates and charges and the terms and conditions of service of the NRC Pipeline through the Tariff approval process under Section 4 of the NGA. If the NRC Pipeline were certificated as an interstate pipeline under the NGA, Section 4 of the NGA would require that the rates and charges collected by, and the terms and conditions of service of, NRC be "just and reasonable" and not "unduly preferential" or "unduly discriminatory." While the just and reasonable rate standard of the NGA commonly refers to "cost-based rates," the FERC has also approved "negotiated rates" for grass roots pipeline such as the NRC Pipeline. *E.g.*, *Rockies Express Pipeline LLC*, 116 FERC ¶ 61,272, P 68-73 (2006); *see also Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines and Regulation of Negotiated Transportation Services of Natural Gas Pipelines*, 74 FERC ¶ 61,076 (1996), *reh'g and clarification denied*, 75 FERC ¶ 61,024, *reh'g denied*, 75 FERC ¶ 61,066 (1996).

(ii) Nebraska Public Service Commission

The scope of the Commission's regulatory jurisdiction and the issues to be considered by the Commission in certificating a new pipeline as a "jurisdictional utility" under Section 53(1) of the SNGRA, NEB. REV. STAT. § 66-1853(1) (2006), are not as well developed as that of the FERC. However, NRC believes that the applicable "public convenience" standard of Section 53(1) of the SNGRA is no less broad than the "public convenience and necessity" test applied by the FERC under the NGA, *i.e.*, it is a broad "public interest" standard, *Cascade Natural Gas Corp. v. FERC*, 995 F.2d 1412, 1421 (10th Cir. 1992); *Atlantic Refining Co. v. Public Service Comm. of N.Y.*, 360 U.S. 378, 391 (1959), calling for consideration of all factors affecting the public interest.

That being the case, NRC proposes to submit to the Commission in support of NRC's Application for certification of the NRC Pipeline, detailed information pertaining to NRC and its

parent, Seminole Energy Services, LLC, demonstrating both the financial and technical capability of NRC to finance, construct and operate the NRC Pipeline consistent with the public interest. NRC also contemplates submitting detailed pipeline specifications, engineering details, right-of-way information, construction plans and procedures, and other technical data to demonstrate that the NRC Pipeline will be constructed in accordance with industry standards and sound engineering practices, and will meet or exceed all applicable federal and state safety and reliability standards.

NRC also plans to submit to the Commission detailed environmental data comparable to that which would be supplied to the FERC in support for a certificate under Section 7(c) of the NGA. Although the State of Nebraska lacks a state-law counterpart to NEPA (the federal statute which requires FERC to perform its detailed environmental assessment), NRC believes that the "public convenience" standard of Section 53(2) of the SNGRA is broad enough to encompass environmental considerations. NRC believes that it would be difficult to argue that a pipeline which presents unacceptable environmental risks nevertheless satisfies the broad public interest standard embedded in the SNGRA. **Accordingly, whether NRC proceeds through a state or federal certification process will not diminish the environmental review process or the environmental safeguards that will apply to the NRC Pipeline.**[8]

To assist the Commission in reviewing the environmental data that the NRC plans to submit, the NRC proposes the Commission adopt a third-party contractor program similar to the one used by FERC. In an effort to respond to concerns raised about the independence of such a contractor and calls for a regulatory system to be in place prior to the Commission asserting

[8] If the environmental review were performed by FERC, FERC could retain an environmental consultant to assist in FERC's review. FERC would assess the cost of such a consultant to NRC. Likewise, in view of the Commission's limited staff resources, NRC contemplates that the Commission will retain an environmental consultant to assist the Commission in discharging its environmental review responsibilities and that the Commission will bill NRC for the reasonable costs of the consultant's services. Therefore, NRC is confident that the Commission's environmental review will be no less rigorous than that of the FERC, although hopefully more expeditious.

jurisdiction, NRC has developed a draft third-party regulatory scheme, attached as Exhibit C, which the Commission could adopt. In response to Commissioner Boyle's question whether the third-party contractor would be truly independent, the following mechanisms under the contracting practice suggested by NRC would ensure the independence of the third-party contractor:

- The third-party contractor would be selected by the Commission
- The third-party contractor will work for and be supervised by the Commission staff; the Applicant will have no access to the third-party contractor's work product until it is publicly available.
- If the third-party contractor needs additional information from the Applicant to evaluate the project, the third-party contractor will work through the Commission staff to draft a data request which will be issued by the Commission staff to the Applicant.
- The Commission will independently review the third-party contractor's work product.
- The Commission will own all documents produced under the contract.
- The Commission will also have complete control over the timeline set for the third-party contractor.
- The Conflict of Interest Disclosure Statement and Questionnaire the third-party contractor would be required to fill out prior to bidding on the contract ensures impartiality of the contractor.
- The Applicant must sign a Conflict of Interest Certification as well attesting to the fact that the contractor is impartial.

If certificated as a jurisdictional utility, NRC's rates to LDCs, and the terms and conditions of NRC's services to LDCs, will be subject to review and approval of the

Commission under Section 6 of the SNGRA, NEB. REV. STAT. § 66-1806 (2006). Again, the specific details of the Commission's ratemaking methodology are not as well developed as those of the FERC. However, NRC proposes to submit for Commission approval a Tariff, cost-of-service based rates with the economic justification therefore, and a request for approval of negotiated rates, in much the same manner as NRC would submit its Tariff and rates for approval by the FERC under Section 4 of the NGA if the NRC Pipeline were certificated by FERC as an interstate pipeline.

Under the terms of the SNGRA, NRC's Commission-regulated rates would not apply to the NRC Pipeline's service to high-volume ratepayers, whose rates are exempt from regulation by the Commission. However, that does not mean that the interests of such high-volume ratepayers will enjoy any less protection by reason of certification of the NRC Pipeline under the SNGRA rather than the NGA. As previously indicated, if the Commission grants NRC a Certificate to operate the NRC Pipeline as a jurisdictional utility, NRC will seek a "limited jurisdiction certificate" from the FERC under 18 C.F.R. § 284.224 (2007) to transport natural gas "in interstate commerce" on behalf of the high-volume ratepayers whose rates are exempt from Commission regulation. NRC's rates for service to those shippers will thereby become subject to regulation by the FERC under Section 4 of the NGA. Under sections 284.224(e) and 284.123(b)(1) of FERC's regulations, 18 C.F.R. §§ 284.224(e) and 284.123(b)(1) (2007), NRC's rates for service to high-volume rate payers will be regulated by the FERC by reference to NRC's state-regulated rates for "comparable service" to state-regulated customers.

Northern urges the Commission to develop regulations governing the application process, the construction and operation of the pipeline, environmental and safety review and oversight, procedures for public and other agency input to the certification process, rules for protection of land-owners and use of rights-of-way, *etc*. NRC does not dispute the current lack of such

regulations. However, NRC does not believe that processing NRC's application under section 53(1) of the SNGRA must await development of a full set of regulations as advocated by Northern.

NRC believes that the legitimate policy objectives Northern's Comments advocate[9] – promotion of the public interest, protection of the environment and public safety – can be achieved through a case-by-case approach as well as through the complex regulatory regime advocated by Northern. NRC has recognized the need to be pro-active in presenting information the Commission will need to make a public interest determination, including proposing a pipeline route and construction procedures that are protective of the environment and public safety. NRC's Application will be designed from the outset to meet the concerns Northern suggests require regulations to be adopted.

NRC also believes that if the Commission were to adopt regulations in the future, the Commission's regulatory process and proposals could benefit significantly from the experience gained in processing NRC's Application. Additionally, NRC would like to remind the Commission that as Ms. Dibbern, General Counsel of NMPP pointed out at the hearing, the Commission has a history of adopting "elements of LB-790 as [the Commission has] dealt with the first case." Commission Hearing Transcript at 89 (NG-0051/PI-130). Moreover, absent an indication that other similarly situated pipelines are likely to file certificate applications with the Commission in the future, it could be a waste of the Commission's time and resources to develop a comprehensive set of regulations that may never be utilized. The Commission also must bear in mind that deciding not to exert jurisdiction until after a regulatory framework has been developed is tantamount to rejecting the NRC's pipeline, contrary to the obvious public interest in new gas supplies that was expressed by Mayor Adams, R.J. Baker, Senator Flood and Ms.

[9] As opposed to Northern's not-so-thinly-veiled objective of delaying the state regulatory process long enough to prevent a competitor, NRC, from entering Northern's private domain.

Dibbern.

G. NRC COMMENTS ON OTHER ISSUES ADDRESSED AT THE HEARING OR IN OTHER PARTIES' COMMENTS.

1. Limited Jurisdiction Certificates.

During the hearing, Commissioner Landis questioned whether FERC commonly issues limited jurisdiction certificates under Section 284.224 of FERC's regulations, 18 C.F.R. § 284.224 (2007). As Mr. Demarest explained, a number of limited jurisdiction certificates have been issued by FERC. In the last three and one-half years, at least six limited jurisdiction certificates have been issued under Section 284.224 of the FERC's regulations to Hinshaw pipelines. *Columbia Gas Transmission Corp.*, 119 FERC ¶ 61,080 (2007); *Northern Indiana Fuel and Light Co., Inc.*, 117 FERC ¶ 62,043 (2006); *Wisconsin Power and Light Co.*, 112 FERC ¶ 62,216 (2005); *Kinder Morgan North Texas Pipeline, L.P.*, 111 FERC ¶ 61,439 (2005); *WPS-ESI Gas Storage, LLC*, 108 FERC ¶ 61,061 (2004); *Yankee Gas Services Co.*, 106 FERC ¶ 62,046 (2004). Additionally, as Mr. Demarest indicated there is also precedent for a holder of a limited jurisdiction certificate to be granted a blanket certificate under Section 157.203 of the FERC's regulations. In particular, *Puget Sound Energy*, 80 FERC ¶ 61,106 (1997), and *Washington Natural Gas Co.*, 71 FERC ¶ 61,290 (1995), are cases where limited jurisdiction certificates were issued to Hinshaw pipelines under Section 282.224 **and** blanket certificates were issued under Section 157.203. *See also Western Gas Resources, Inc.*, 85 FERC ¶ 61,087 (1998), and *Continental Natural Gas, Inc.*, 83 FERC ¶ 61,065 (1998), for additional cases in which holders of limited jurisdiction certificates were issued blanket certificates under Section 157.203.

In testimony before the Commission, SourceGas argues that Section 284.224 only applies where a Hinshaw pipeline exports local production as opposed to receiving interstate production and distributing it locally. Commission Hearing Transcript at 120 (NG-0051/PI-130). While

many requests for a limited jurisdiction certificates under Section 284.224 have authorized the type of service described by SourceGas, Section 284.224 of FERC's regulations does not limit blanket certificates to such circumstances. Section 284.224 states,

> "This section applies to local distribution companies served by interstate pipelines, including persons who are not subject to the jurisdiction of the commission, by reason of section 1(c) of the Natural Gas Act. … Such certificate will authorize the local distribution company to engage in the sale or transportation of natural gas that is subject to the Commission's jurisdiction under the Natural Gas Act."

18 C.F.R. §§ 284.224(2) and 284.224(b)(3) (2007) (section 284.224 in its entirety is attached as Exhibit D for the Commission's convenience).[10] Simply put, Section 284.224 provides an opportunity for a Hinshaw pipeline to continue operating as a Hinshaw pipeline even though some of its activities do not qualify for Hinshaw status, regardless of which Hinshaw requirement would no longer be satisfied.[11] Therefore, NRC's request for a limited jurisdiction certificate falls squarely within the four corners of Section 284.224, given that the NRC Pipeline's service to high-volume ratepayers will not be regulated by the Commission and, therefore, would not qualify the NRC Pipeline for Hinshaw status with respect to such service. Furthermore, as Mr. Demarest indicated at the hearing, NRC has discussed this subject in detail on several occasions with senior FERC officials and they agree that nothing in Section 284.224 limits the purposes for which a limited jurisdiction certificate may be issued to a Hinshaw pipeline as SourceGas suggests. Commission Hearing Transcript at 125 (NG-0051/PI-130).

2. Cost Allocation

Beginning with the Federal Power Commission and continuing today, the FERC has

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[10] A Hinshaw pipeline is a "local distribution company" for this purpose. *See* NGPA section 2(17), 15 U.S.C. 3301(17); *see also* Certain Transportation, Sales and Assignments by Pipeline Companies not Subject to Commission Jurisdiction Under Section 1(c) of the Natural Gas Act, Order 63, 45 Fed. Reg. 1872 (Jan. 9, 1980), FERC Stats. & Regs. ¶ 30,118 (1980).

[11] To qualify as a Hinshaw pipeline the pipeline must (1) receive all of their gas supplies at or inside the state border, (2) the gas must be consumed totally within the state and (3) the pipeline must be subject to state jurisdiction.

consistently required costs to be allocated between jurisdictional and non-jurisdictional services. In *Panhandle Eastern Pipe Line Co. v. Federal Power Commission*, the Supreme Court affirmed the FPC's policy of allocating costs between jurisdictional and non-jurisdictional businesses. *Panhandle Eastern Pipe Line Co. v. Federal Power Commission*, 324 U.S. 635, 641-642 (1945). As explained in the FERC Staff Report on Interstate Gas Pipeline Ratemaking, this means the "costs are allocated to [non-jurisdictional services] without regard to the rates actually charged." OFFICE OF PIPELINE AND PRODUCER REGULATION, FEDERAL ENERGY REGULATORY COMMISSION, STAFF REPORT ON INTERSTATE GAS PIPELINE RATEMAKING, II-6 (1982). This policy ensures that the costs are allocated between jurisdictional and non-jurisdictional services thereby guaranteeing that jurisdictional services do not subsidize non-jurisdictional services. Because the FERC's long-standing policy on cost allocation protects the jurisdictional customer, NRC will employ this approach in the ratemaking proposals NRC submits with its Application for certificate authorization under Section 53(1) of the SNGRA.

3. **Non-Discriminatory Access**

Cornerstone urges that all marketers must be given open, non-discriminatory access to the NRC Pipeline. Cornerstone's concerns in this regard are fundamentally misplaced. Cornerstone appears to be laboring under the impression that NRC will compete with Cornerstone in providing natural gas **commodity** sales to LDCs and large end-users. As previously indicated, NRC is a transportation-only pipeline. Shippers who acquire capacity on the pipeline are free to satisfy their gas commodity requirements by obtaining gas supplies from any supplier capable of delivering the gas to the NRC Pipeline Receipt Point. In addition, no affiliate of NRC will be given any preferential access to the pipeline or to shippers served by the pipeline.

Under the non-discriminatory open season under which NRC has sought precedent

agreements with interested shippers on the NRC Pipeline, Cornerstone has always had the opportunity to subscribe to capacity on the NRC Pipeline. NRC has no objection to Cornerstone marketing gas to shippers on the NRC Pipeline. In addition, NRC has no objection to Cornerstone acquiring capacity on the NRC Pipeline that Cornerstone would then use to supply gas to its own customers, either directly connected to the NRC Pipeline or located behind LDC city-gates.

However, NRC does most strenuously object to any requirement that would give Cornerstone a free ride on the NRC Pipeline system without subscribing to, and paying for, firm capacity, or accepting the lower quality and reliability of interruptible service. To do so would be unduly preferential to Cornerstone and unduly discriminatory against those shippers whose commitments to subscribe to capacity on the NRC Pipeline are the linchpin to the success of the project.

4. Procedural Arguments

NRC is a potential competitor to SourceGas in serving high-volume ratepayers in Nebraska. SourceGas proposes that the threshold jurisdictional issues raised by NRC be deferred to the formal Application proceeding. With all due respect, NRC believes this proposal is not constructive. Deferral of resolution of the threshold jurisdictional issues would preclude NRC from proceeding before the Commission.

SourceGas' support for deferral is the claim that "NRC has provided very few facts regarding its plans to construct and operate the NRC Pipeline in Nebraska." SourceGas Comments at 2. To the contrary, NRC believes that it has provided the Commission and the public a substantial amount of factual information concerning NRC's plans to serve LDCs and high-volume ratepayers in Nebraska. This information includes substantial amounts of additional detail provided in NRC's Comments filed in this docket, and the information NRC has

made available in public briefings (SourceGas even attached a copy of one to its own Comments) and on NRC's website. NRC strongly disputes any contention that the Commission is being asked to rule "in a vacuum," or that NRC has not provided as much factual information as it is practically feasible to provide, given the evolving character of the project. NRC has provided significant and appropriate detail for this proceeding as it will in its ultimate certificate application.

Similarly, SourceGas' Comments posit a possible violation of the Nebraska Administrative Procedure Act ("APA"), contending that NRC seeks a "declaratory order" without satisfying the procedural requirements applicable thereto. SourceGas Comments at 3. Whether or not styled as a "declaratory order," NRC does not believe that uncertainty over who would be "necessary parties" precludes the Commission from addressing the threshold jurisdictional issues when adequate public notice has afforded all interested persons a full and fair means to participate.

SourceGas also questions whether the "special circumstances" requirement of the APA has been met. SourceGas Comments at 4. NRC observes that the issues presented are ones of first impression. The NRC Pipeline would be the first non-grandfathered utility to seek a Certificate as a jurisdictional utility under section 53(1) of the SNGRA. The NRC Pipeline would be the **only** intrastate/Hinshaw pipeline in Nebraska. Those facts alone demonstrate the "applicability of special circumstances" warranting action by the Commission to remove uncertainty so that much-needed natural gas transportation infrastructure can be developed to serve customers in Nebraska.

H. CONCLUSION

For the reasons set forth above and in NRC's Hearing presentation, the Commission should expeditiously grant the jurisdictional rulings requested by NRC. Specifically, the

Commission should rule:

1. Local distribution companies are **not** "high-volume ratepayers" within the meaning given such term under section 2(7) of the SNGRA, NEB. REV. STAT. § 66-1802(7) (2006).

2. Nebraska's prohibition against "double piping" under SNGRA section 52, NEB. REV. STAT. § 66-1852 (2006), **does not apply** to a new pipeline interconnect to an LDC already served by an interstate pipeline.

3. The Commission has jurisdiction over an Application for a Certificate under section 53(1) of the SNGRA, NEB. REV. STAT. § 66-1853(1) (2006), to operate, as a "jurisdictional utility," a pipeline located wholly within the state of Nebraska to deliver natural gas to local distribution companies and other customers.

Furthermore, in view of the public interest in expeditious regulatory approval of a pipeline to deliver natural gas to customers in central northeast Nebraska within the time constraints imposed by expiring natural gas transportation contracts and plant construction schedules over which NRC has no control, the Commission should issue its determinations of these jurisdictional issues as promptly as possible as final decisions.

The Commission should reject the arguments of Intervenors in opposition to the NRC Pipeline project for the reasons set forth herein.

The Commission should endorse NRC's proposal for the Commission to discharge its obligations to broadly consider the public interest under Section 53(1) of the SNGRA, NEB. REV. STAT. § 66-1853(1) (2006), through retention of an independent consultant, the costs of which would be borne by NRC.

Finally, a proposed form of Commission Order is attached at Exhibit E.

Respectfully Submitted,

NEBRASKA RESOURCES COMPANY, LLC

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Loel P. Brooks
Brooks, Pansing and Brooks
1248 O Street, Suite 984
Lincoln, Nebraska 68508
(402) 476-3300
lbrooks@brookspanlaw.com

William F. Demarest, Jr.
Blackwell Sanders Peper Martin LLP
750 17th Street, N.W. Suite 1000
Washington D.C. 20006
(202) 378-2300
wdemarest@blackwellsanders.com

Attorneys for Nebraska Resources Company, LLC

EXHIBIT A

The Omaha World
Lack of Natural Gas Hinders Norfolk's Growth

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Lack of natural gas hinders Norfolk's growth

BY PAUL HAMMEL
WORLD-HERALD BUREAU

LINCOLN — Inadequate natural gas supplies have cost Norfolk the chance to land at least one new business — and may cost it others.

That has prompted several state senators to join Norfolk in urging a state regulatory commission to help route a second gas pipeline to the city.

Speaker of the Legislature Mike Flood of Norfolk said Monday that his city lost a $40 million soybean processing plant and up to 200 jobs because Norfolk's lone natural gas provider, Kinder Morgan, was unwilling to work with local officials to increase its capacity to deliver gas needed by the firm.

A Kinder Morgan spokesman said the company had tried to work with Norfolk and the soybean firm to increase its gas pipeline delivery.

"Competition is good. Options are better," Flood wrote in a recent letter to the Nebraska Public Service Commissior "At this time, Norfolk has no options. We have no opportunity to grow."

The commission is scheduled to hold a public hearing Sept. 25 to decide whether the state agency can approve construction of a new natural gas pipeline proposed between Clay Center and Columbus. The pipeline planned by Seminole Energy Services of Tulsa, Okla., could be extended to Norfolk and resolve the delivery problems there, officials said.

"Right now, we don't have a capacity to serve a major industry that needs natural gas," Flood said in an interview. "That takes us out of the running for a lot of major industries and projects."

Norfolk is not alone in facing such an economic development roadblock, according to Lowell Johnson, city administrator in Wayne, another northeast Nebraska community.

He said his area recently lost a combined livestock feeding facility and ethanol plant because of an insufficient supp of natural gas.

"We were totally caught off guard" by the problem, Johnson said.

Norfolk City Administrator Mike Nolan said the operators of two area ethanol plants are also worried that they may not have adequate supplies of natural gas. The Norfolk City Council, he said, recently sent a letter to the Public Service Commission voicing its concern.

Norfolk's problem surfaced in late July when Specialty Protein Producers of Port Washington, Wis., announced that was abandoning plans for an organic soybean processing plant in Norfolk. The company said it would be building in South Sioux City, Neb., which had adequate natural gas supplies.

The switch came after the City of Norfolk had annexed a site for the soybean plant. Flood said local economic developers had also helped the firm raise $16 million in capital from Norfolk-area investors prior to the switch.

"We're hungry for jobs, and we're willing to work for them," said Flood, citing Norfolk's loss of 1,350 jobs 19 montl ago when Tyson Foods closed a meat-processing plant in the community.

Flood said Kinder Morgan was unwilling to work as a "partner" with Norfolk in bringing in the needed natural gas.

Larry Pierce, a spokesman with Houston-based Kinder Morgan, said the company was willing to pay 70 percent of the estimated $10 million cost of expanding its pipeline but wanted the start-up soybean firm to provide the other 30 percent.

In the end, Pierce said, Specialty Protein found better economic benefits by locating in South Sioux City rather thar Norfolk.

But the problem has generated several written comments to the Public Service Commission, including letters of support from the cities of Norfolk and Central City; State Sens. Annette Dubas of Fullerton and Arnie Stuthman of Platte Center; and businesses such as Behlen Manufacturing Co., Midwest Ethanol and NuCor Steel.

Seminole is asking the commission for an exemption — never before used in Nebraska — that allows for state, rather than federal, regulation of intrastate pipelines.

If granted such an exemption, Seminole officials have said they could build the pipeline much sooner than if federal approval were needed.

Laura Demman, director of the Public Service Commission's natural gas department, said it is unclear if her agency, under current state law, could authorize and regulate the new pipeline.

Rod Johnson, chairman of the commission's elected board, said he is unsure how he'll rule on the question, but if it aids economic development in Nebraska, "it's something that obviously we'd want to look at."

Johnson, who represents Norfolk, said a ruling on the regulatory question most likely will come two to three weeks after the hearing.

Contact the Omaha World-Herald newsroom

EXHIBIT B

Table summarizing State, Federal and local governing bodies with jurisdiction over the NRC Pipeline

PERMITS AND AUTHORIZATIONS

AGENCY	PERMIT/AUTHORIZATION	STATUS
FEDERAL		
U.S. Corps of Engineers (COE)	Clean Water Act- Section 404 Permits Authorization for impacts to Waters of the United States	Agency Site Visit Conducted 7/12/07. Guidance Received 7/27/07
Fish & Wildlife Service (F&WS)	Endangered Species Act – Section 7 Consultation for Clearance Authorization and Biological Opinion	Agency Site Visit Conducted 7/12/07. Guidance Received 8/28/07
Environmental Protection Agency (EPA)	Clean Water Act Section 404- Jurisdictional Waters Significant Nexus Review	Coordination ongoing
United States Department of the Interior- Bureau of Reclamation	Comment on Project and effect on Reclamation facilities, lands or resources	Clearance letter received 6/26/07
Federal Energy Regulatory Commission (FERC)	Natural Gas Act certificate.	Coordination initiated
USDA Natural Resources Conservation Service	Consultation to determine if proposed project would have any impact on farmland	Clearance letter received July 2, 2007
STATE		
State Historical Preservation Office (SHPO)	Consultation Under Section 106 of the National Historic Preservation Act	Coordination ongoing.
Nebraska Department of Roads (NDOR)	Encroachment/Road Crossing Permit	Coordination initiated
	State Highway Crossing Permits	Coordination initiated
	Interstate 80 Crossing Permit	Coordination initiated
Nebraska Department of Environmental Quality (NDEQ)	NPDES General Permit for storm water discharge associated with construction	Agency project meeting 8/3/07. Coordination ongoing.
	Clean Water Act Section 401 Certification for impacts to Waters of the State.	Agency Site Visit Conducted 7/12/07. Coordination concurrent with COE Section 404 permits
	Substitute Water Supply Plan (hydrostatic test water supply)	Agency project meeting 8/3/07. Coordination ongoing.
	Industrial Wastewater Discharge Permit (NPDES for hydrostatic test water supply)	Agency project meeting 8/3/07. Coordination ongoing.
	Title 117 anti-degradation compliance	Coordination ongoing

AGENCY	PERMIT/AUTHORIZATION	STATUS
Nebraska Game and Parks Commission	Consultation to determine if proposed project would have any impact on State listed threatened or Endangered Species or Critical Habitat.	Agency Site Visit Conducted 7/12/07. Coordination ongoing
	Natural Heritage Program- Database review of "At-risk" species and communities.	Received 6/26/07
Nebraska State Fire Marshall	Construction Plans Approval	Coordination initiated
Nebraska Public Service Commission (NPSC)	Nebraska State Natural Gas Regulation Act	Coordination initiated
LOCAL		
Clay County	County permit allowing construction across county road	Coordination initiated
	County floodplain construction permits	Coordination initiated
Hamilton County	County permit allowing construction across county road	Coordination initiated
	County floodplain construction permits	Coordination initiated
York County	County permit allowing construction across county road	Coordination initiated
	County floodplain construction permits	Coordination initiated
Polk County	County permit allowing construction across county road	Coordination initiated
	County floodplain construction permits	Coordination initiated
Butler County	County permit allowing construction across county road	Coordination initiated
	County floodplain construction permits	Coordination initiated
Colfax County	County permit allowing construction across county road	Coordination initiated
	County floodplain construction permits	Coordination initiated
CITY		
Pending final design and TBS connection points		

EXHIBIT C

Draft Third-Party Regulatory Scheme

THIRD PARTY CONTRACTOR PROGRAM

- Along with a formal request to the Commission to use a third party contractor ("TPC"), the Applicant should submit a draft Request for Proposal ("RFP") that includes a list of target contractors, included for informational purposes only, with its application. An RFP must include the following:

  - A cover page disclaimer which notifies the bidder that this is not a state contract and that the parties agree to indemnify and hold the Commission harmless.

  - A section that explains the bidding process and sets forth the roles and responsibilities of the parties as described below.

  - An overview of the project which contains:

    - General purpose of the project;

    - Description of the project location by county and pertinent landmarks;

    - Description of the project including: length, diameter and capacity of the pipeline; number and horsepower of new and modified compressor stations; the location and land requirements including temporary work spaces, pipe storage yards, access roads, storage field boundaries, etc.; storage facilities projects should specify the number of wells and type of storage; and

    - If the project is a storage field or LNG facility then provide as detailed a description of the project as possible.

  - A detailed description of the TPC services required, including:

    - Preparing all project-related documents, studies, tests and reports;

    - Scheduling and attending pubic and/or interagency meetings and then summarizing those meetings;

    - Developing and maintaining a mailing list of interested parties;

    - Facilitating issue identification and resolution including identifying and assessing potential alternatives;

    - Preparing an environmental report which comports with all relevant state and federal laws;

    - Continually reviewing potential issues and alerting the Commission staff of any potential data gaps or analysis shortcomings;

    - Arranging site inspections and right-of-way inspections (Applicant may be consulted for logistical information);

    - Reviewing and responding to comments filed in response to the environmental data; and

    - Developing and maintaining a project management system to track schedule and budget status.

  - The Applicant's proposed schedule with dates for key events.

- A requirement that each bidder[1] sign a Conflict of Interest Disclosure Statement either declaring there is no conflict of interest or if there is a potential or actual conflict of interest the bidder should explain the potential or actual conflict and submit a mitigation proposal. As part of the Conflict of Interest Disclosure Statement, the TPC must submit a list of all Commission regulated entities that it and any subcontractors have either an ongoing or previous business relationship with. All TPCs must fill out a Conflict of Interest Questionnaire as well.
- A list of information the TPC's bid must contain, including:
    - A description of the TPC's technical approach and management plan. Any subcontractors should be identified;
    - A description of the TPC's and any subcontractor's qualifications and experience;
    - A proposed schedule for the work with any differences from the RFP's schedule highlighted and explained; and
    - An itemized cost estimate.
- An explanation of how the Applicant will evaluate the bids, including the following:
    - Prior experience;
    - Demonstrated understanding of the project and issues involved;
    - Demonstrated showing of sufficient resources to meet the proposed schedule;
    - Ability to assign and commit key personal to the project;
    - Past contract performance record;
    - Possession of the necessary equipment to complete the task, such as: computer, transportation, etc.;
    - Conflict of Interest Disclosure Statement and Questionnaire; and
    - Total cost.
- A statement notifying bidders that the Applicant and not Commission staff will answer any questions as to why a bidder was not chosen.
- The RFP should also including the following appendices:
    - Conflict of Interest Disclosure Statement and Questionnaire;
    - Conflict of Interest Certification;
    - Project Overview Map;

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[1] A bidder refers to the prime contractor, the subcontractors (unless they only provide supplies), all affiliates unless the prime or subcontractor files for them, any entity owned or represented by the chief executives or directors of the prime or subcontractors or consultants, chief executives and directors if they are involved in performing the proposed work of the prime contractor, subcontractor, consultant or affiliate.

- List of Available Background Documents which should be reviewed prior to submission of a bid; and
- Sample Contract.

- Following approval of the RFP, the Applicant shall issue the RFP to the list of target contractors. Thereafter, the Applicant shall hold a contractor's conference to discuss any questions contractors might have about the RFP.
- The Applicant will then select its top three choices based on the following criteria:
  - Technical adequacy; and
  - Conflict of Interest: A conflict of interest exists when the work will result in an unfair competitive advantage to a contractor or impair the contractor's objectivity in performing the contract work.
- The Applicant will then submit for each of its three choices:
  - A written rationale for why this candidate was chosen;
  - The contractor's technical and cost proposal;
  - Conflict of Interest Disclosure Statement and Questionnaire; and
  - A Conflict of Interest Certification from the person reviewing the bids stating that the chosen bidder has met the Commission's Conflict of Interest requirements.
- If the Applicant determines there are less than three qualified bidders, then the Applicant must submit a written statement explaining why the Applicant believes there are less than three qualified bidders, and the Applicant must explain the process used to solicit bids.
- The Commission will then select the winning bid and issue the Applicant an approval letter.
- Within ten days of receiving the approval letter, the Applicant should enter into a contract with the winning bidder. At that time, the Applicant and the TPC will determine the form and method of payment.
- The TPC will work exclusively for the Commission. The Applicant will not have access to the TPC's work product until it is publicly available. Post-award communication between the TPC and the Applicant shall be governed by the ex parte communication rule at NEB. REV. STAT. §§ 84-901 *et seq*. The Commission will own all documents produced pursuant to the contract. The Commission will establish the scope and timeline of the TPC's work. The Commission is ultimately responsible for the content of the TPC's work.
- If a conflict of interest develops after the contract has been awarded, the TPC should notify the Commission and not the Applicant. The Commission will make a determination as to whether the conflict can be appropriately mitigated. To avoid a potential or actual conflict of interest once the contract has been signed, a TPC cannot enter into another contract with the Applicant. The TPC also may not enter into a contract with another party if the third party has a similar project in the same geographic area or if the contract would create a perception of a conflict of interest.

- If supplemental information is needed to evaluate the project, the TPC will assist the Commission in drafting a data request to be issued by the Commission, *i.e.*, the TPC will not have direct contact with the Applicant, or the TPC will be instructed to carry out the requisite tests or studies, which do not have to be specifically identified in the RFP.
- In addition to preparing the environmental data, after the environmental data is released to the public the TPC must draft responses to comments filed.

EXHIBIT D

18 C.F.R. § 284.224 (2007)

§ 284.224 Certain transportation and sales by local distribution companies.

(a) *Applicability.* This section applies to local distribution companies served by interstate pipelines, including persons who are not subject to the jurisdiction of the Commission, by reason of section 1(c) of the Natural Gas Act.

(b) *Blanket certificate.* (1) Any local distribution company served by an interstate pipeline or any Hinshaw pipeline may apply for a blanket certificate under this section.

(2) Upon application for a certificate under this section, a hearing will be conducted under section 7(c) of the Natural Gas Act, §157.11 of this chapter, and subpart H of part 385 of this chapter.

(3) The Commission will grant a blanket certificate to such local distribution company or Hinshaw pipeline under this section, if required by the present or future public convenience and necessity. Such certificate will authorize the local distribution company to engage in the sale or transportation of natural gas that is subject to the Commission's jurisdiction under the Natural Gas Act, to the same extent that and in the same manner that intrastate pipelines are authorized to engage in such activities by subparts C and D of this part, except as otherwise provided in paragraph (e)(2) of this section.

(c) *Application procedure.* Applications for blanket certificates must be accompanied by the fee prescribed in §381.207 of this chapter or a petition for waiver pursuant to §381.106 of this chapter, and shall state:

(1) The exact legal name of applicant; its principal place of business; whether an individual, partnership, corporation or otherwise; the state under the laws of which it is organized or authorized; the agency having jurisdiction over rates and tariffs; and the name, title, and mailing address of the person or persons to whom communications concerning the application are to be addressed;

(2) The volumes of natural gas which:

(i) Were received during the most recent 12-month period by the applicant within or at the boundary of a state, and

(ii) Were exempt from the Natural Gas Act jurisdiction of the Commission by reason of section 1(c) of the Natural Gas Act, if any;

(3) The total volume of natural gas received by the applicant from all sources during the same time period;

(4) Citation to all currently valid declarations of exemption issued by the Commission under section 1(c) of the Natural Gas Act if any;

(5) A statement that the applicant will comply with the conditions in paragraph (e) of this section;

(6) A form of notice suitable for publication in the Federal Register, as contemplated by §157.9 of this chapter, which will briefly summarize the facts contained in the application in such way as to acquaint the public with its scope and purpose; and

(7) A statement of the methodology to be used in calculating rates for services to be rendered, setting forth any elections under §284.123 or paragraph (e)(2) of this section and a sample calculation employing the methodology using current data. If a rate election is made under paragraph (e)(2) of this section, this statement shall contain the following items (reflecting the 12-month period used to justify costs in the most recently approved rate case conducted by an appropriate state regulatory agency):

(i) Total operating revenues,

(ii) Purchase gas costs,

(iii) Distribution costs (which include that portion of the common costs allocated to the distribution function),

(iv) The volume throughput of the system categorized by sales, transportation and exchange service, and

(v) A study which determines transportation costs on a unit revenue basis in accordance with paragraph (e)(2) of this section, including any supporting work papers.

(d) *Effect of certificate.* (1) Any certificate granted under this section will authorize the certificate holder to engage in transactions of the type authorized by subparts C and D of this part.

(2) Acceptance of a certificate or conduct of an activity authorized thereunder will:

(i) Not impair the continued validity of any exclusion under section 1(c) of the Natural Gas Act which may be applicable to the certificate holder, and

(ii) Not subject the certificate holder to the Natural Gas Act jurisdiction to the Commission except to the extent necessary to enforce the terms and conditions of the certificate.

(e) *General conditions.* (1) Except as provided in paragraph (e)(2) of this section, any transaction authorized under a blanket certificate is subject to the same rates and charges, terms and conditions, and reporting requirements that apply to a transaction authorized for an intrastate pipeline under subparts C and D of this part.

(2) *Rate election.* If the certificate holder does not have any existing rates on file with the appropriate state regulatory agency for city-gate service, the certificate holder may make the rate election specified in §284.123(b)(1) only if:

(i) The certificate holder's existing rates are approved by an appropriate state regulatory agency,

(ii) The rates and charges for any transportation are computed by using the portion of the certificate holder weighted average annual unit revenue (per MMBtu) generated by existing rates which is attributable to the cost of gathering, treatment, processing, transportation, delivery or similar service (including storage service), and

(iii) The Commission has approved the method for computing rates and charges specified in paragraph (e)(2)(ii) of this section.

(3) *Volumetric test.* The volumes of natural gas sold or assigned under the blanket certificate may not exceed the volumes obtained from sources other than interstate supplies.

(4) *Filings.* Any filings made with the Commission that report individual transactions shall reference the docket number of the proceeding in which the blanket certificate was granted.

(5) *Tariff filings.* The tariff filing requirements of part 154 of this chapter shall not apply to transactions authorized by the blanket certificate.

(f) *Pregrant of abandonment.* Abandonment of transportation services or sales, pursuant to section 7(b) of the Natural Gas Act, is authorized upon the expiration of the contractual term of each individual arrangement authorized by a blanket certificate under this section.

(g) *Hinshaw pipeline without blanket certificate.* A Hinshaw pipeline that does not obtain a blanket certificate under this section is not authorized to sell or transport natural gas as an intrastate pipeline under subparts C and D of this part.

(h) *Definitions.* For the purposes of this section:

(1) A *Hinshaw pipeline* means any person engaged in the transportation of natural gas which is not subject to the jurisdiction of the Commission under the Natural Gas Act solely by reason of section 1(c) of the Natural Gas Act.

(2) *Interstate supplies* means any natural gas obtained, either directly or indirectly, from:

(i) The system supplies of an interstate pipeline, or

(ii) Natural gas reserves which were committed or dedicated to interstate commerce on November 8, 1978.

[45 FR 1875, Jan. 9, 1980, as amended by Order 319, 48 FR 34891, Aug. 1, 1983; 48 FR 35635, Aug. 5, 1983; Order 433, 50 FR 40346, Oct. 3, 1985. Redesignated and amended by Order 436, 50 FR 42497, 42498, Oct. 18, 1985; Order 478, 52 FR 28467, July 30, 1987; Order 581, 60 FR 53074, Oct. 11, 1995]